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Chairman: Mr. Yañez-Barnuevo ..... (Spain)

Contents

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session

Agenda item 79: Report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session

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The meeting was called to order at 3.05 p.m.

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*) (A/60/10)

1. **Sir Michael Wood** (United Kingdom) said that the Special Rapporteur's tenth report on reservations to treaties (A/CN.4/558 and Adds. 1 and 2) was a classic in its field, both in the practice set out and in the analysis of the practice and doctrine. It went to the core issues of the topic, and as a result it merited careful study and debate before definitive conclusions were drawn.

2. With respect to the process of objecting to reservations, a major problem for many States was the paucity of resources within foreign ministries for considering the many reservations formulated by others. Moreover, there might often be a policy reason for not reacting to a reservation; relations with the reserving State or the subject matter involved might be delicate. In view of the practical and policy problems, it was not clear what significance should be attached to a failure to object to a reservation. One suggestion might be to develop further best practice in the field, a subject which might usefully be considered at the 2006 International Law Week. In certain European institutions it had been found helpful for member States to consider reservations collectively.

3. The Commission had asked for comments on the practice whereby States objected to a reservation that they considered incompatible with the object and purpose of a treaty, but without opposing the entry into force of the treaty between themselves and the author of the reservation. Although that was a crucial and difficult matter, in practice the issue of compatibility with the object and purpose of a treaty arose in a relatively small number of rather extreme cases. The vast majority of reservations were dealt with satisfactorily through the operation of the normal rules of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna Conventions). The advisory opinion of the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide had stated that acceptance of a reservation as being compatible with the object and purpose of the Convention entitled a party to consider the reserving State to be a party to the treaty. Conversely, where the reservation was not compatible with the object and purpose, the State could not be regarded as being a party to the Convention. That was the approach that the United Kingdom had consistently followed in its own treaty practice, and it did not appear to differ significantly from the approach of the Special Rapporteur.

4. On the related issue of the "super-maximum effect" of an objection, consisting in the determination not only that the reservation objected to was not valid but also that, as a result, the treaty as a whole applied ipso facto in the relations between the two States, his delegation considered that that could occur only in the most exceptional circumstances, for example, if the State making the reservation could be said to have accepted or acquiesced in such an effect.

5. He was sceptical about the value of seeking to define the concept of the "object and purpose" of a treaty in the abstract, but it was helpful to consider how it had been approached in individual cases in practice. The proposed draft guidelines 3.1.7 to 3.1.13 should perhaps be moved into the commentary. He also had doubts about the attempt to define the term "specified reservations", being unsure that the definition offered had captured all the circumstances in which reservations could be specified within the meaning of article 19, subparagraph (b), of the Vienna Conventions. The importance of the vexed terminological issue of the use of "validity" versus "permissibility" might have been overstated; the answer might become clear once the overall structure of that part of the draft guidelines was complete.

6. With regard to draft guideline 3.1, his delegation had no problem with the text, which was taken from article 19 of the 1986 Vienna Convention, but felt that in the title, "Freedom to formulate reservations", the word "freedom" was not apt in the context of the reservations regime of the Vienna Conventions. The United Kingdom shared the doubts about the presumption of validity of reservations, since there must be a balance between the need to facilitate participation in a treaty and the need to maintain the unity of the treaty. Care should be taken not to fragment that aspect of the law of treaties. Any suggestion that special rules on reservations might apply to treaties in different fields, such as human rights, would not be helpful. It should not be forgotten

that the modern law on reservations to multilateral treaties owed its origin to the advisory opinion of the International Court of Justice on reservations to the Genocide Convention.

7. With regard to the topic "Shared natural resources", the United Kingdom had no direct interest in transboundary aquifers and aquifer systems but looked forward to the Commission's work on other aspects of the topic. His views on the topic "Unilateral acts of States" had not changed.

8. **Mr. Hernes** (Norway), speaking on behalf of the five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) on chapter IV of the Commission's report, welcomed the priority given by the Commission to the topic "Shared natural resources" and commended it for the complete set of draft articles on transboundary aquifers and aquifer systems. However, whether adopted as a convention or a non-binding instrument, those articles would not remove the need for concrete bilateral and regional arrangements, as well as a supplementary regulatory framework to resolve outstanding issues. Accordingly, he was pleased that draft article 3 encouraged States to enter into such arrangements. The Nordic countries also welcomed the fact that the draft articles took into account the need to protect and preserve ecosystems within a transboundary aquifer or aquifer system and provided for the obligation to prevent, reduce and control the pollution of such aquifers or aquifer systems that might cause significant harm to other aquifer States or to their environment. In addition, the Nordic countries fully supported the obligations contained in draft articles 16 and 17. Assessments of the potential effects of planned activities on a transboundary aquifer or aquifer system would be crucial to ensure the sustainable use of those resources.

9. Lastly, he noted with satisfaction that the focus of the topic at issue had become the transboundary nature of the aquifers. Since the term "shared resources" could be rather misleading in that context, the Nordic countries fully supported renaming the topic thereby making it clear that the Commission wished to enhance ways and means of ensuring the sustainable use of transboundary aquifers within the general framework of territorial sovereignty and jurisdiction of States.

10. **Mr. Trauttmansdorff** (Austria) said that his delegation welcomed the approach taken by the Special Rapporteur on unilateral acts of States in his eighth report (A/CN/4/557), and agreed that it was too early to establish draft provisions. Instead, the Commission should continue to review existing State practice and on that basis elicit a framework and possible principles.

11. In that regard, his delegation wished to offer two practical examples of unilateral acts. In 1955 Austria had adopted a constitutional law declaring its permanent neutrality. It had notified all States with which it then had diplomatic relations with the request that they should recognize Austria's neutrality. Some States had explicitly recognized its neutral status; others had not objected to it. Austria's permanent neutrality had therefore resulted from a unilateral act based on national legislation and was valid as long as that legislation was in force. There was little established international practice regarding what would be required to terminate that status formally in the event of a change in the relevant legislation; termination by *contrarius actus* seemed to be the most appropriate idea.

12. The second example related to negative security guarantees. When such declarations had first been made in 1978 by the foreign ministers of the nuclear Powers, Austria had concluded, on the basis of international judicial precedent, that the declarations were binding on the respective nuclear Powers. However, the nuclear Powers had announced that it had not been their intention to create obligations binding under international law. A similar situation had occurred with the declarations made in 1995. In view of that practice, his delegation agreed with the view that the intent of the State to commit itself was an important feature of the identification of unilateral acts as sources of international law.

13. On the topic "Reservations to treaties", his delegation highly commended the tenth report of the Special Rapporteur (A/CN.4/558 and Add.1) and welcomed in principle the guidelines adopted by the Commission at its fifty-seventh session. His delegation did have some doubts whether draft guidelines 2.6.1 and 2.6.2 would clear up the confusion left by the Vienna Convention on the Law of Treaties. One source of confusion was uncertainty as to whether the provisions on objections in articles 20 and 21 of the Vienna Convention also applied to the provisions in article 19 on reservations that were not admissible. The negotiating process leading to the Convention suggested that an objection could produce at least two

kinds of effects: either the objecting party would declare that the reservation was prohibited (in the Special Rapporteur's language "invalid") under article 19, or the objection would produce the effects envisaged in articles 20 and 21.

14. In order to avoid confusion it would be better to distinguish those different kinds of objection by giving them different designations. An objection to the admissibility of reservations under article 19 should be called a "rejection"; the term "objection" should be reserved for the second type of reaction, and the two kinds of reactions to reservations should be dealt with in two different sub-guidelines. Moreover, there was a third category of reactions to reservations covered by the definition contained in draft guideline 2.6.1, which consisted of a declaration by one party to a treaty stating that it had doubts regarding the admissibility (or validity) of a reservation owing to the lack of clarity of the reservation, a problem addressed in draft guideline 3.1.7.

15. With regard to the draft guidelines proposed by the Special Rapporteur, his delegation welcomed the introduction of criteria to determine the object and purpose of a treaty and would recommend combining draft guidelines 3.1.5 and 3.1.6, since the criteria were more important than the definition, which was by its nature subjective. It appreciated the attempt in draft guideline 3.1.7 to single out vagueness and generality as criteria in determining invalidity and agreed that it was the impossibility of assessing the compatibility of such reservations with the object and purpose of the treaty, rather than the certainty that they were incompatible, that made them fall within the purview of article 19, subparagraph (c), of the Vienna Convention.

16. However, it might be the case that a vague reservation was not incompatible with the object and purpose of a treaty. In such cases, it might be advisable to enter into a dialogue with the author of the reservation to clarify its compatibility; if the author refused to cooperate, in case of doubt the reservation would be considered contrary to the object and purpose. Another solution would be to declare vague reservations inadmissible or invalid because they did not meet the condition in article 2, paragraph 1 (d), of the Convention that they must be directed towards "certain provisions of the treaty".

17. His delegation would prefer the material in draft guidelines 3.1.8 and following to be placed in the commentary, thereby reducing the risk of abuse if the reasons listed in them for characterizing a reservation as contrary to the object and purpose of a treaty were taken as limitative. Lastly, Austria agreed to the use of the term "validity" as discussed in the report.

18. His delegation commended the set of 25 draft articles on shared natural resources proposed by the Special Rapporteur for the topic but believed that the well-established precautionary principle ought to be included in them. The legal form the articles should take should be discussed only after the content had been further refined. The main purpose of the draft articles was to provide a framework for the elaboration of legally binding agreements between States that shared groundwater resources.

19. For more detailed comments on the aforementioned topics he urged Committee members to read the written statement of Austria, which would be circulated.

20. **Mr. Ehrenkrona** (Sweden), speaking on behalf of the five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said, with respect to the topic "Reservations to treaties", that the general principle that the formulation of reservations was permitted was fundamental to the entire reservations regime, although the right to formulate reservations was not absolute. The Nordic countries agreed with the view that article 19 of the Vienna Convention established the presumption of freedom to formulate reservations, which was substantially different from the presumption of validity of reservations.

21. The Nordic countries wished to focus on the criterion of the compatibility of a reservation with the object and purpose of a treaty and welcomed the attention currently being devoted to it by the Commission. There was fairly well established State practice in Europe in that area, particularly with regard to human rights treaties. Draft guideline 3.1.5 attempted to define the elusive concept of "object and purpose". Use of the term "raison d'être", although acceptable, provided little clarification, being equally elusive. A definition might not be necessary, since the terminology used in the Vienna Convention reflected established legal principles for the teleological method of interpreting of treaties. The practice of an increasing number of States, including the Nordic countries, when

objecting to reservations incompatible with the object and purpose of a treaty, was to sever the reservation in question from the treaty relation on the basis of the clear intent of article 19, subparagraph (c), of the Vienna Convention that a reservation incompatible with the object and purpose of the treaty should not be permitted. To permit such reservations would undermine the entire multilateral treaty system.

22. The issue of the legal effect of objections to such reservations could be approached by looking at article 21 of the Vienna Convention, which concerned the legal effect of reservations and objections to reservations formulated in accordance with article 19. A reservation incompatible with the object and purpose of a treaty was not formulated in accordance with article 19, so that the legal effects listed in article 21 did not apply. When article 21, paragraph 3, stated that the provisions to which the reservation related did not apply as between the objecting State and the reserving State to the extent of the reservation, it was referring to reservations permitted under article 19. It would be unreasonable to apply the same rule to reservations incompatible with the object and purpose of a treaty. Instead, such a reservation should be considered invalid and without legal effect. Theoretically, an objection was not necessary in order to establish that fact but was merely a way of calling attention to it. The objection therefore had no real legal effect of its own and did not even have to be seen as an objection per se; consequently, the time limit of twelve months specified in article 20, paragraph 5, of the Convention, should not apply. However, in the absence of a body that could authoritatively classify a reservation as invalid, such as the European Court of Human Rights, such "objections" still served an important purpose.

23. The practice of severing reservations incompatible with the object and purpose of a treaty accorded well with article 19, which made it clear that such reservations were not expected to be included in the treaty relations between States. While one alternative in objecting to impermissible reservations was to exclude bilateral treaty relations altogether, the option of severability secured bilateral treaty relations and opened up possibilities of dialogue within the treaty regime. However, account must be taken of the will of the reserving State regarding the relationship between the ratification of a treaty and the reservation.

24. The Nordic countries hoped that that constructive State practice would be reflected in the outcome of the Commission's work and wished to underline the importance, if a definition were to be elaborated, of not narrowing the scope of the compatibility criterion as understood in current practice or of the severability doctrine. It was essential to reflect the developing State practice in the area of incompatible reservations in the draft Guide to Practice if the Guide was to be widely used and accepted by States.

25. **Mr. Lammers** (Netherlands) said that, since many of the Netherlands' natural resources were shared with other States or located in areas beyond the limits of its national jurisdiction, his delegation attached great importance to the international regulation of that field. However, his Government still had a number of concerns about the general approach to the topic. First, the draft articles proposed by the Commission covered only aquifers, which seemed to preclude the possibility of developing a comprehensive set of rules governing all shared natural resources. It was also unclear why the draft articles could not apply also to gaseous and liquid substances other than groundwaters. Due attention should be given to the relationship between groundwater and such other substances before completing the first reading of the draft articles rather than the second, as suggested by the Special Rapporteur.

26. Second, the presentation of the proposals as draft articles left little doubt as to the preferred final form of the instrument. Indeed, the draft articles could only prevail over the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses if they were adopted in the form of a legally binding instrument. However, while all States would be free to participate in such an instrument, participation was likely to be considered only by the relatively small number of States in whose territory any part of a transboundary aquifer or aquifer system was located. Furthermore, if the proposed rules were intended merely as a framework, States were unlikely to consent to be bound by a convention if the subject matter was to be regulated by bilateral and regional arrangements. The relatively scarce treaty practice in the field of shared natural resources might also be a reason to rethink the framework approach, particularly since States would always have the freedom to deviate from or complement the provisions of a treaty inter se to the extent that such a treaty did not contain jus cogens.

27. Turning to draft article 7, he said that paragraph 1 correctly presented the prevention aspect as a duty of

due diligence. However, the formulation of paragraph 3 mirrored that of the equivalent provision of the 1997 Convention and did not, therefore, take into account the progress made by the Commission on the question of compensation in recent years. Accordingly, having regard to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, it seemed appropriate to replace the phrase "discuss the question of compensation" with the words "ensure that prompt and adequate compensation is provided".

28. With regard to draft article 14, he said that further consideration should be given to the formulation of the second sentence and the arguments underlying it. Unlike the Special Rapporteur, the Government of the Netherlands took the view that the precautionary principle was already part and parcel of customary international law. In addition, and irrespective of that view, the Netherlands preferred the term "precautionary principle" to the existing "precautionary approach". Moreover, the second sentence did not reflect the fact that precaution was not dictated by uncertainty about the state of the environment alone, but by uncertainty about the impact of a human activity on the environment.

29. Turning to chapter X of the Commission's report, he observed that States parties, as guardians of a particular treaty, appeared to have a moral, if not legal, obligation to object to a reservation that was contrary to the object and purpose of that treaty. They must therefore develop a consistent practice in that field and give adequate consideration to what was and was not contrary to the object and purpose of a particular treaty. It was equally important to establish an administrative structure to facilitate the submission of objections within the time limit set by article 20 of the Vienna Convention on the Law of Treaties.

30. By objecting to a reservation deemed to be contrary to the object and purpose of a particular treaty without opposing the entry into force of the remainder of that treaty, objecting States might be perceived as attaching too little importance to the nature of the reservation. However, contemporary treaties, in particular human rights treaties, contained a multitude of substantive rules, a great many of which were self-contained. Thus, when evaluating the impact of a reservation considered to be contrary to the object and purpose of a treaty, consideration should be given to whether the impact of that reservation would be limited to the provision itself or whether it would have a broader effect on the substantive content of a treaty. In the former case, there was evidently no need to exclude the possibility of applying the remainder of the treaty between the reserving State and the objecting State. Consequently, the premise was that, on balance, it was more attractive for the objecting State to enter into treaty relations, albeit limited, with the reserving State than not to enter into treaty relations at all. While article 21, paragraph 3, of the Vienna Convention on the Law of Treaties had provided the flexibility required in contemporary practice, it had also given rise to a certain à la carte approach by reserving States.

31. Nevertheless, in some cases, an objecting State had chosen to enter into treaty relations despite the fact that the reservations made were of a very broad, extremely general and imprecise nature. In such cases, the objecting State had probably decided that the reserving State should remain accountable to it in respect of the remainder of the treaty. In addition, since the entry into force of the Vienna Convention on the Law of Treaties, the primary function of an objection had changed. In the current system, the political aspect of an objection, namely, the view expressed by the objecting State on the desirability of a reservation, played a central role, and the legal effects of such an objection were becoming increasingly peripheral.

32. With regard to the tenth report on reservations to treaties (A/CN.4/558 and Add.1) he said that it was difficult to understand why the Commission, which had met with the other human rights treaty bodies to discuss reservations, had not met with the Committee on the Elimination of Discrimination against Women also. The Netherlands fully supported the idea of holding a seminar on the subject of reservations to human rights treaties and trusted that the Committee on the Elimination of Discrimination against Women would be invited to participate. His delegation would be interested in hearing about the outcome of the seminar, and in particular whether the Commission's work in that area had been of relevance to the related activities of the treaty bodies.

33. The Netherlands agreed with the Special Rapporteur that "object and purpose" must be understood as one and the same notion rather than as two separate concepts and that that notion referred to the core obligations (or raison d'être) of a treaty. However, a degree of subjectivity was involved in determining those core obligations and it must

therefore be acknowledged that, while the law of treaties appeared to be a set of neutral secondary rules on the legal effects of treaties, it did contain some subjective elements.

34. Lastly, he said that the Special Rapporteur's extremely useful work on reservations should be brought to a conclusion in the near future. He hoped that the Commission would finalize the guidelines in 2006 so that they could be distributed to States.

35. **Mr. Jaafar** (Malaysia), referring to the topic "shared natural resources", noted that, in his third report (A/CN.4/551 and Corr.1 and Add.1) the Special Rapporteur had incorporated the term "geological formation" into draft article 2, thereby taking account of Malaysia's previous observation that an aquifer or aquifer system could consist not only of rock but also of other naturally occurring materials, consolidated or unconsolidated, such as gravel and sand.

36. He proposed deleting the word "harmonized" from draft article 10, paragraph 1, since the establishment of universally applicable standards and methodologies for monitoring a transboundary aquifer or aquifer system might impose too great an obligation on aquifer States and, given the differences between aquifers and aquifer systems in the respective aquifer States, might not be practical. In that connection, his delegation agreed with the Commission that it was more appropriate to incorporate such a provision into bilateral or regional arrangements. He also endorsed the use of the word "encouraged" in draft article 14.

37. Lastly, he noted that draft article 21, inter alia, protected an aquifer State from being compelled to provide data or information that was vital to its national defence and security, although it did not provide for such protection on the basis of national interest. Nevertheless, Malaysia supported the proposal to extend the protection provided under that article to cover industrial secrets and intellectual property.

38. **Ms. Woollett** (Australia) expressed her delegation's continued support for efforts to revitalize the Sixth Committee's consideration of the Commission's report, in particular the increased number of interactive discussions with Commission members.

39. With regard to the topic "Reservations to treaties", she congratulated the Special Rapporteur for having sought to clarify the interpretation of article 19 of the Vienna Convention on the Law of Treaties. The draft guidelines, which were intended to be a code of recommended practices rather than a set of binding rules, provided direction in terms of which categories of reservations might be considered contrary to the object and purpose of a treaty. The Commission had requested Governments to comment on the practice of objecting to a reservation without opposing the entry into force of the treaty. In that connection, Australia expected that States making reservations would do so only in good faith and would not attempt to frustrate their own stated purpose of entering into the treaty.

40. When, on becoming party to a treaty, a State made a reservation in good faith and that reservation was objected to by another State, Australia expected that the provision to which the reservation related would not apply between the reserving State and the objecting State. There might also be cases in which the objecting State objected to the treaty as a whole, not just the provision to which the reservation related, entering into force between itself and the reserving State. However, the objecting State might also have good reasons not to follow that course of action and might instead prefer at least some elements of the treaty in question to apply between itself and the reserving State. The Vienna Convention on the Law of Treaties, in particular articles 20 and 21 thereof, did address those issues, but it was possible that those articles were not intended to apply to reservations prohibited under article 19.

41. **Mr. Sheeran** (New Zealand) observed that water was essential to human survival and the topic "Shared natural resources" would become increasingly important since underground aquifers represented most of the world's fresh water supply. His delegation supported the Special Rapporteur's approach to the topic and, in particular, his decision to seek advice from hydrogeologists and other experts. The legal norms adopted should make sense to those working with aquifers at a practical level and, while much remained to be done, the Working Group on Transboundary Groundwaters had already made considerable progress.

42. Currently, the draft articles focused, as was appropriate, on the obligations of States in which transboundary aquifers were located. However, it might also be appropriate to include some very general duties applicable to all States in order to acknowledge that the issue had a wider international dimension. Such a

structure would also reflect the flow of more general to more specific recommendations at the global, national and regional levels contained in a number of other international regimes on environmental questions.

43. Transboundary aquifers must be managed by the relevant countries at the regional or local level and in such a way as to take account of the specific features of each individual aquifer. Accordingly, it might be more useful to adopt the draft articles as recommendatory principles rather than as a convention. A set of such principles would represent an authoritative statement of the international standards and best practice in the area and could be regarded as the framework within which the relevant bilateral and regional negotiations would take place.

44. The topic "Unilateral acts of States" had been a difficult one. However, the case studies in the Special Rapporteur's eighth report (A/CN.4/557) were very useful, as they illustrated the essential point of the topic, namely, that unilateral acts of States could produce legal effects and might even result in a State being unintentionally bound by its acts. He agreed with the Commission that it was not appropriate to produce definitions and rules comparable to the regime established by the Vienna Convention on the Law of Treaties, since the circumstances of a particular unilateral act that might produce legal effects were so diverse and dependent on contextual factors as to be almost impossible to codify. However, the Working Group had made a useful contribution to the topic and the Commission should conclude its work by drawing some reasonably broad conclusions from the case studies.

45. With regard to the topic "Reservations to treaties", his delegation had no particular difficulties with the guidelines adopted by the Commission at its most recent session but it would be very interested in the outcome of the Commission's further consideration of the difficult issue of reservations that were incompatible with the object and purpose of the treaty. His delegation had some doubts about whether it would be useful or even possible to specify in guideline form the object and purpose of a given treaty, since some treaties might have more than one object and purpose. In addition, his delegation was not sure whether it would be possible to state categorically that particular categories of reservation would always be prohibited on account of being contrary to the object and purpose of a treaty.

46. **Mr. Hasegawa** (Japan) commended the Commission on the substantial progress it had made on the topic "Shared natural resources" during the year, and especially on the establishment of the Working Group. Groundwaters were an indispensable resource for human beings and in view of the topic's importance careful consideration of it was to be expected. In that regard, the assistance of groundwater experts from international organizations such as the United Nations Educational, Scientific and Cultural Organization, the Food and Agriculture Organization of the United Nations and the International Association of Hydrogeologists was greatly appreciated. Given the critical nature of the topic, the Commission must draw some conclusions and produce output at an early stage. The shortage of groundwater resources as a result of over-exploitation and pollution was currently one of the clear and imminent worldwide environmental threats, and there was an absolute need to have some legal framework on the topic. It was the Commission's task to respond to that need within an appropriate time, and it should avoid being overly ambitious by trying to incorporate premature rules and principles into the instrument.

47. During the discussion in the Commission, some members had insisted on including provisions on the precautionary principle or the duties of non-aquifer States, but the incorporation of such rules might result in long years of unnecessary debate in the Commission, and even if some conclusions were eventually reached the entire topic might turn out to be rather outdated by the time the work was completed. The Commission should address the issue in a realistic manner, and should maintain, or even hasten, the pace of its consideration.

48. In his third report (A/CN.4/551 and Corr.1 and Add.1), the Special Rapporteur had proposed that recharging and non-recharging aquifers should be treated differently, because different rules would apply to each category. Some members of the Commission had pointed out that the criteria for that distinction seemed to be insignificant from a practical perspective, but his delegation supported the Special Rapporteur's proposal. While from a purely theoretical and technical perspective there might be cases in which it was not easy to make such a distinction, it would be sustainable in respect of most transboundary aquifers and would be feasible for the purposes of the instrument.

49. With regard to draft article 7, there had been a debate in the Commission concerning the reference to "compensation". His delegation considered that the problem of liability or responsibility could more properly be dealt with in other instruments, and that inclusion of those rules in the instrument under discussion might complicate the Commission's work. If a reference to "compensation" were to be included, it should be kept in a non-obligatory form, as proposed by the Special Rapporteur.

50. With regard to the form of the final instrument, his delegation fully agreed with the Special Rapporteur that the Commission should focus on substance rather than form at the current early stage, and that the existing form should not be considered as prejudging the final outcome. The Commission should take the relevant decision at a later stage, taking into account the views expressed in the Sixth Committee.

51. His delegation supported the Working Group's proposal that it should reconvene during the Commission's fifty-eighth session to complete its work, and hoped that the Commission would make further substantial progress during the coming year and proceed to the drafting process at the earliest possible date.

52. Turning to the topic "Unilateral acts of States", he noted that the Special Rapporteur's eighth report (A/CN.4/557) contained a detailed presentation of eleven examples or types of such acts. There was a lack of common understanding regarding the concept, which was not without ambiguity, so the Special Rapporteur had been correct to devote most of his examination to State practice in order to deepen the comprehension of the topic. Nevertheless, the debate had shown a tendency to go round in circles, and nine years of consideration had not produced as significant an achievement as might have been expected. That seemed to have been largely due to the diversity of practices categorized as unilateral acts of States. The form, content, authors and addressees of such acts were diverse, and at the current stage it seemed that it would be difficult to formulate a definition representing a meaningful legal concept covering all the acts discussed under the topic.

53. Some members of the Commission had expressed doubts as to the appropriateness of the topic for codification. His delegation, however, believed that its codification should be viewed as a means of obtaining guidelines concerning the extent to which States might be considered bound by their own voluntary commitments. The elaboration of a legal regime applicable to such acts would help to clarify their legal effect and thereby enhance certainty and stability in international relations. In order to expedite its work, the Commission might have to concentrate on certain categories of acts, rather than proceeding with the codification under the general heading of "Unilateral acts of States".

54. As to the points on which the Commission had requested comments and observations (A/60/10, para. 28), his Government considered that the revocability and modification of unilateral acts depended on the form, content, authors and addressees of the act, and must be determined by examining each category or type of unilateral act. His delegation looked forward to the preliminary conclusions which were to be submitted by the Special Rapporteur at the Commission's next session, and it would facilitate further consideration of the topic.

55. Turning to the topic "Reservations to treaties", he said that his delegation shared the Special Rapporteur's view that the guidelines must be as detailed and comprehensive as possible in order to be practical and workable. Ten years had passed since the Commission had begun considering the topic, and it would be appreciated if the work were to be completed soon, and the entire set of guidelines presented to the Committee in the near future. He requested the Special Rapporteur to provide the Committee with the time-line for the completion of the Commission's work in 2006.

56. In his tenth report (A/CN.4/558 and Add.1), the Special Rapporteur had proposed using the term "validity" instead of controversial terms such as "permissibility", "admissibility" and "opposability". His delegation basically supported the approach of using a more neutral term so as to avoid eliciting a largely academic debate on the legal nature of the reservation. It might, however, be more pragmatic to leave the terms in brackets for the time being and return to them after considering all the possible effects of reservations.

57. With regard to the points on which the Commission had requested comments (A/60/10, para. 29) he said that even if an objecting State declared that a reservation was incompatible with the object and purpose of the treaty, it could maintain treaty relations

with the reserving State in respect of all other treaty provisions. Unless a third party organ, such as an international court, decided the object and purpose of the treaty, it was usually for each individual State to decide such matters. A common understanding regarding the object and purpose of the treaty could be formed through the accumulation of instances of objection, acquiescence or approval with regard to the reservation. If a State objected to another State's reservation, declaring that it was not compatible with the object and purpose of the treaty but without opposing the entry into force of the treaty between the two States, the immediate effect of the objection was limited to the exclusion of the relevant provision. However, through its declaration of incompatibility, the objecting State expressed its interpretation of the treaty, which could influence other States' interpretations. The declaration might also send a message to the reserving State, which might feel obliged to withdraw the reservation if the majority of States objected to it. His delegation hoped that there would be a detailed discussion of the issue, including consideration of the points it had raised, at the Commission's next session.

58. **Mr. Lavalle-Valdés** (Guatemala), speaking on the topic "reservations to treaties" and referring to draft guideline 2.6.1, said that unless an objection to a reservation stated, under article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions, that the author opposed the entry into force of the treaty as between itself and the reserving State, then the objection would not have the legal effect of limiting the scope or application of the reservation. As implied in paragraph 8 of the Special Rapporteur's ninth report (A/CN.4/544), that could result in a paradox in which the objection would be tantamount to an acceptance of the reservation by the objecting State. His delegation therefore agreed with the position of Portugal, the United States and Pakistan, referred to in footnote 34 of the Special Rapporteur's ninth report, to the effect that it would be preferable not to include a definition of "objection" in the guidelines.

59. As suggested in draft guideline 2.6.1, it might appear useful to include in the Guide to Practice a guideline establishing that it did not matter how an objection was phrased or named. His delegation did not agree with that suggestion, however, because in the case of a statement which might be considered an objection to a reservation for the purposes of part II, section 2, of the Vienna Convention but which was formulated in such a way as to raise questions as to whether it should be considered an objection, the depositary of the treaty would not be concerned with how those questions were resolved nor did it have to make a decision in that regard.

60. With regard to draft guideline 3.1, his delegation agreed with the first sentence of paragraph 400 of the Commission's report. In draft guideline 3.1.1, the chapeau and the first line immediately following it were a tautology. In the next line, the words "including the reservation in question" should be added immediately after the words "specified provisions". The same words should be added at the end of the third line as well; in that case, however, the reservation in question could not be considered to be "expressly" prohibited by the treaty.

61. The second sentence of paragraph 390 of the Commission's report confirmed his delegation's view that a reservation that was incompatible with the object and purpose of the treaty would ipso facto preclude the reserving State from becoming a party to the treaty. Consequently, any objection to a reservation based on the argument that it was incompatible with the object and purpose of the treaty should indicate that the objecting State considered the reserving State as not being a party to the treaty in question. By the same token, although in some cases the rules on objections to reservations contained in part II, section 2, of the Vienna Conventions might apply, by analogy, to such objections, they were not in principle subject to those rules.

62. The issue of the effects of a reservation that was incompatible with the object and purpose of the treaty raised serious concerns. The problem might disappear if all States adopted the practice advocated by the Nordic countries of severing incompatible reservations. It was extremely doubtful, however, that such a practice could be universally applied.

63. Paragraph 371 of the Commission's report seemed to point to the possibility that a treaty might, either expressly or implicitly, allow reservations that were incompatible with its object and purpose. A reservation that was incompatible with the object and purpose of the treaty in question should never be considered permissible; guidelines 3.1.3 and 3.1.4 were therefore unnecessary.

64. With regard to guideline 3.1.2, his delegation agreed with the last sentence of paragraph 404 of the report, except that it should also refer to the Spanish and French versions.

65. On the question of formulating a general rule for determining the object and purpose of a treaty, his delegation agreed with the last sentence of paragraph 416 of the report. There seemed to be a tendency to adopt guidelines that went beyond the scope of a guide to practice and into the sphere of interpretation of the provisions on reservations contained in the Vienna Conventions. If the General Assembly adopted such guidelines, it would be engaging in an exercise of interpretation. While that could be a useful development of international law, interpretive guidelines could also create problems.

66. **Ms. Pasheniuk** (Ukraine) expressed the hope that the codification exercise in respect of reservations to treaties in which the Commission was engaged would lead to the adoption of a set of provisions to regulate that important area of international law. As a party to the Vienna Conventions of 1969 and 1986, Ukraine supported the traditional view that in the light of articles 19 to 23 of the 1969 Vienna Convention, alternatives to reservations, modifications to reservations or late reservations made after signing, ratifying, accepting, approving or acceding to treaties should not be considered as reservations. If a modification to a reservation did not constitute a withdrawal or partial withdrawal it should constitute a new reservation which would require acceptance by the other parties to the treaty.

67. The practice of extending the 90-day period for objections to late reservations or modifications to reservations to 12 months must be compatible with article 77, paragraphs 1 (c) and 1 (e) and article 78 of the 1969 Vienna Convention, if otherwise not provided for by a treaty. The absence of objections to such kinds of reservations in the aforementioned period should not be interpreted as the tacit consent of Ukraine to such reservations. At the same time, Ukraine believed that such communications should not be ignored, especially by the depositary, and that the issue should be examined in depth by the Commission in order to develop a procedure which could be applied to such situations. Such procedures should be regulated by articles 39 to 41 of the 1969 Vienna Convention.

68. **Ms. Belliard** (France), referring to the tenth report of the Special Rapporteur for the topic "reservations to treaties" (A/CN.4/558), said that her delegation preferred the term "opposability" to "validity". The concept of "validity" was not really neutral, and the idea of "opposability" better reflected the reality of the relations between a reserving State and the other contracting parties which would result from the formulation of a reservation. By over-emphasizing the question of validity, the Commission might give the erroneous impression that the parties to a treaty could simply refuse to recognize the existence of a reservation which they considered to have no validity.

69. Her delegation agreed with the Special Rapporteur's suggestion that article 19 of the Vienna Convention on the Law of Treaties should be included in draft guideline 3.1 without substantially changing the wording. Any necessary clarifications could be included in the following draft guidelines. Draft guidelines 3.1.1 to 3.1.4 were particularly pertinent.

70. Draft guideline 3.1.5, concerning the definition of the object and purpose of the treaty, was useful but could still be improved. It was useful in that it treated object and purpose as a single concept. However, the object and purpose of the treaty should not necessarily be limited to the "essential provisions of the treaty, which constitute its raison d'être", as it was sometimes difficult to determine exactly what those essential provisions were. Equating the object and purpose of the treaty with its "essential provisions" might encourage parties to be lenient about reservations which dealt with relatively minor issues but which affected the balance of the overall text. Draft guideline 3.1.5 seemed to stress the letter of the treaty to the detriment of its spirit. Draft guideline 3.1.6, which outlined the method for determining the object and purpose of the treaty, included some useful provisions, particularly the reference to the "basic structure". That approach might also be taken to defining the object and purpose of the treaty.

71. Regarding draft guidelines 3.1.7 and 3.1.11, she noted that in practice, reservations concerning the application of domestic law were often worded in vague, general terms and might therefore give rise to concern. In such cases, the other parties to the treaty could not be sure of the extent of the reserving State's commitment to the treaty, and they might even have misgivings about the future development of the

domestic law of the reserving State. A more precise wording should be found for those two draft guidelines.

72. Turning to the question raised by the Commission concerning the practice of States that objected to a reservation which they considered incompatible with the object and purpose of the treaty yet did not oppose the entry into force of the treaty in their relations with the reserving State, she noted that such a position was paradoxical. How could a State object to a reservation that was incompatible with the object and purpose of the treaty without deciding not to be bound by the treaty in respect of the reserving State? Nevertheless, some would argue that the objecting State could decide that even though the reservation in question jeopardized the object and purpose of the treaty, that would not preclude the application of significant provisions between itself and the reserving State. The objecting State might also expect that its objection, by conveying disapproval, would open the way for what the Special Rapporteur had referred to as the "reservations dialogue" by encouraging the reserving State to reconsider the need for or the content of its reservation. However, the objecting State could not simply ignore the reservation and act as if it had never been formulated. As her delegation had already indicated, such an objection would create the so-called "super-maximum effect", since it would allow for the application of the treaty as a whole without regard to the fact that a reservation had been entered. That would compromise the basic principle of consensus underlying the law of treaties.

73. **Mr. Pellet** (Special Rapporteur) said that he appreciated the suggestions made by Committee members, in particular the United Kingdom, Austria and Sweden, for improving the dialogue on reservations to treaties. Given the complexity of his work, he could not promise to finish the first reading in 2006. He preferred to prepare a Guide to Practice based on thorough research, even if it took several years, rather than to put something together in haste.

74. Regarding his suggestion that the Commission should hold a seminar with the human rights treaty bodies in 2006, he noted that for budgetary reasons, the Commission had been unable to meet with the Committee on the Elimination of Discrimination against Women. The seminar would provide an opportunity for a general exchange of views between the Commission and the human rights bodies; however, in order to permit such an exchange, the Sixth Committee would have to adopt a resolution indicating its support for the proposal so as to enable the secretariat to find the necessary funding.

75. Turning to the substantive issue of reservations to treaties, he noted that several delegations had expressed concerns not so much about whether it was useful to define the object and purpose of the treaty as about whether that was even possible. He himself was not satisfied with his proposed text for draft guideline 3.1.5; however, he felt that it was a good start. He agreed with the representative of France that the proposed text was helpful but could be improved. He trusted that in 2006 he would be able to submit to the Commission some more workable proposals for defining the object and purpose of treaties, at least with regard to the question of validity of reservations. In particular, he wished to assure the representative of Austria that he was considering combining draft guidelines 3.1.5 and 3.1.6.

76. Turning to the issue of "super-maximum" reservations, he agreed with most of the views expressed by the representative of Sweden on behalf of the Nordic countries, but remained rather sceptical about the conclusions they had reached. He agreed that a reservation that was contrary to the object and purpose of the treaty would not be valid, that such a reservation should not be entered and that it should not have any effect. Once a State had taken that position, however, it had to decide either to be bound by the treaty as a whole or not at all. The idea that an objecting State could require another State to be bound against its will was contrary to the fundamental principle of consensus. The intention of the reserving State was the crucial issue. He refused to entertain the notion that an objecting State could require a reserving State to be bound by the treaty as a whole.

77. He was puzzled by the replies given so far to the question that the Commission had put to the Sixth Committee, at his request, regarding States that raised objections to a reservation but still considered the reserving State to be a party to the treaty and chose to be bound to it on the remaining matters. The explanations offered, in particular by the representatives of the Netherlands and France, were probably valid politically; nevertheless, he wondered why a State would insist on saying that a reservation was contrary to the object and purpose of a treaty. It could simply raise an objection without accusing the

reserving State of leaving the treaty devoid of substance. States were not required to state the reasons for their objections to reservations, so it was not even necessary to raise the issue of the object and purpose of the treaty. For a State to say that a reservation was contrary to the object and purpose of the treaty but that it still wished to be bound to the reserving State was indeed a paradox.

Agenda item 79: Report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session (*continued*) (A/60/17; A/C.6/60/L.7 and L.8)

78. **The Chairman** drew attention to draft resolution A/C.6/60/L.7, entitled "Report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session". He recalled that when introducing the draft resolution at the tenth meeting of the Committee the representative of Austria had announced that Azerbaijan had joined the sponsors; he wished to inform the Committee that Bolivia, the Dominican Republic, the Gambia and Latvia had also joined the sponsors.

79. *Draft resolution A/C.6/60/L.7 was adopted.*

80. **The Chairman** drew attention to draft resolution A/C.6/60/L.8, entitled "United Nations Convention on the Use of Electronic Communications in International Contracts". He recalled that at its 13th meeting the Committee had decided that the secretariat would append the dates for opening for signature in article 16 and the relevant date in the testimonium in the text of the draft Convention. In that connection, he wished to inform the Committee that the Convention would be open for signature at United Nations Headquarters from 16 January 2006 to 16 January 2008.

81. *Draft resolution A/C.6/60/L.8 was adopted.*

82. **Ms. Belliard** (France), speaking in explanation of her delegation's position, said that France had long recognized the need to create the conditions for recognizing the validity of electronic documents exchanged in concluding contracts in the context of international trade. While the draft Convention did to a certain extent contribute to that, it nevertheless had real shortcomings. First, France regretted that the fundamental concept of legal security was not better taken into account in an area — that of electronic commerce — where it was particularly necessary. Excessive flexibility was granted to the parties, which were under no obligation to indicate their place of business. Likewise, the draft Convention embodied as an absolute principle the autonomy of the parties, which would be empowered to apply the Convention to their contracts or not, or to derogate from any of its provisions. Lastly, the excessively broad definition of the scope of application of the text did not seem relevant; in fact, the Convention did not require for its application that the parties be situated in a State which had adhered to it. It therefore created obligations for States which were not be parties to it, thus constituting a precedent which did not seem desirable in international law. Her delegation wished its statement to appear in the Committee's report.

The meeting rose at 5.30 p.m.

United Nations A/C.6/60/SR.15

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Chairman: Mr. Samy (Vice-Chairman) ..... (Egypt)
later: Mr. Yañez-Barnuevo (Chairman) ..... (Spain)

Contents

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session *(continued)*

Statement by the President of the International Court of Justice

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In the absence of Mr. Yañez-Barnuevo (Spain), Mr. Samy (Egypt), Vice-Chairman, took the Chair.

The meeting was called to order at 10.10 a.m.

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session *(continued)* (A/60/10)

1. **Ms. Wilson** (United States of America) said that, given the complexity of the topic "Shared natural resources" and widely varying State practice in the matter, context-specific arrangements were probably the best way to address pressures on transboundary groundwaters. Rather than producing a convention, it would be more useful if the Commission were to draw up a list of guidelines to help States negotiate more meaningful bilateral or regional arrangements. Plainly, the Commission's work on that topic did not amount to a codification exercise, because the content of the proposed draft articles went well beyond the established law. Declaratory articles, for example, would be inappropriate. Her Government supported the Commission's work on the daunting subject of aquifers, but urged it to avoid more controversial issues, such as oil and gas, which could detract from the overall exercise.

2. The topic "Unilateral acts of States" posed particular challenges. The protracted disagreement among members of the Commission on a number of fundamental issues might even call in question the worth of pursuing the study. Other States should carefully consider whether there was any likelihood of successfully concluding the project in the near future. The importance of the part played by the addressees of unilateral statements and the significance of the reactions of third parties underscored the fact that the specific context in which a unilateral act took place, as opposed to the act itself, played such a central role that the topic might well prove to be unamenable to codification or progressive development. Similarly, intent, in other words whether a State manifestly intended to enter into a legal commitment, was another crucial aspect where codification and progressive development were neither appropriate nor feasible.

3. With regard to the topic "Reservations to treaties", the Commission had requested comments on the effect an objection to a reservation to a treaty would have if that objection was made on the grounds that the reservation was incompatible with the object and purpose of the treaty and if the objecting State did not oppose the entry into force of the treaty between itself and the reserving State. Her Government disagreed with the position adopted by some others that, if a State had made a reservation which was incompatible with the object and purpose of a treaty, it might be bound by the treaty without the benefit of the reservation, should another party properly object to the reservation on that basis. While reservations which were incompatible with the object and purpose of the treaty were impermissible under article 19 (c) of the Vienna Convention on the Law of Treaties, an objecting State must determine whether it was desirable to remain in a treaty relationship with a reserving State, despite the existence of what it considered to be an impermissible reservation. If, however, an objecting State rejected a treaty relationship with a reserving State on the basis of an objectionable reservation, the reserving State could always withdraw its reservation. To suggest that a State could be bound by a treaty without the benefit of a reservation it had made would directly conflict with the basic principle of consent.

4. *Mr. Yañez-Barnuevo (Spain) took the Chair.*

5. **Mr. Hernández García** (Mexico) said that the importance of reservations for the legal consequences of treaties made it crucial to clarify the situation by means of a wide-ranging study of the existing law and the interpretation and practice of States and other subjects of international law. The Special Rapporteur had correctly stated that, under article 19 of the Vienna Convention on the Law of Treaties, the formulation of reservations was permitted unless reservations were prohibited by a given treaty or were incompatible with its object and purpose. The freedom to formulate a reservation was therefore not unlimited. A number of questions relating to exceptions under article 19 (c) had been effectively addressed in draft guidelines 3.1 to 3.1.13, but a more pressing question concerned the application of the criterion of conformity with the object and purpose of a treaty. That criterion was not subsidiary to the exceptions contained in article 19 (a) and (b). His delegation therefore concurred with the Special Rapporteur's view that any reservation expressly or tacitly authorized by the treaty must be compatible with its object and purpose. It was, however, seldom easy or straightforward to determine such object and purpose. The Special Rapporteur's broad definition of the concept was commendable,

since it enabled the criterion to be applied on a case-by-case basis.

6. He also commended the elaboration of draft guidelines 3.1.7 to 3.1.13 to address specific cases of certain kinds of reservation. Of particular interest were the question of who could rule on the invalidity of reservations and the legal consequences of invalidity, on which the Vienna Convention was silent. His delegation endorsed the list of those competent to assess the validity of reservations contained in draft guideline 3.2. The fact that States could determine the invalidity of a reservation reflected the consensual nature of legal norms, but since such a procedure could lead to disagreement between the parties to a treaty, it was essential that treaties should include clear dispute settlement provisions and, where appropriate, establish a monitoring or depositary body to determine the validity of the reservation.

7. Draft guidelines 3.3.2 and 3.3.3 were entirely satisfactory. The former was of particular importance, since it resolved many of the problems that could arise as a result of silence by States regarding reservations that had been made. It meant that, where a reservation was invalid under article 19 (c) of the Vienna Convention, it was automatically null and void even if there had been no objections by other States. Together with draft guideline 3.3.3, it demonstrated that the validity or invalidity of a reservation was directly related to the objective elements of treaty law and was not a subjective decision on the part of States. His delegation therefore disagreed with the thrust of guideline 3.3.4, "Effect of collective acceptance of an invalid reservation", on the grounds that, once it had been established that an invalid reservation was null and void, there should be no exceptions. No further action by States should be necessary; the very expression "invalid reservation" implied the nullity of the reservation. Otherwise the spirit of the treaty in question, and the very integrity of the legal regime of treaty law, would be called into question.

8. Obviously, the functioning of treaty law and the implementation of treaties did not depend exclusively upon regulatory articles. The basic element was the goodwill of the parties, which in turn depended on an appropriate text. States should, above all, give greater consideration to reservation clauses and should recognize the importance of establishing monitoring bodies to determine the validity of treaties or effective dispute settlement mechanisms. They should also take more account of reservations made by the other States parties. Only if States showed a greater degree of compromise could the quality and functioning of treaty law be improved.

9. **Ms. Oh** Jin-hee (Republic of Korea), referring to the topic "Shared natural resources", said that the issue of transboundary groundwaters affected a limited number of States. The Commission should therefore accelerate its work on that aspect of the topic so that it could move on to other aspects, including oil and gas, that might be more complex to handle but were also relevant to a greater number of States. She believed that that view reflected the wishes of many non-aquifer States. Meanwhile, the Commission should focus on any legal rules on the use of groundwaters that differed from those featured in the Convention on the Law of the Non-Navigational Uses of International Watercourses — if there were any such — so that there was no duplication. Similarly, if an instrument on groundwaters was created, it seemed likely that, unless non-aquifer States enjoyed certain rights only a small number of directly affected States would be induced to become parties to the instrument, which therefore might not enter into force. It might be preferable to draw up a model regional convention that would be acceptable to all States in a given region. The Commission should, however, give due weight to the opinions of States that were directly affected with regard to the final legal form of the instrument.

10. With regard to the topic "Unilateral acts of States", it was widely accepted that such acts created obligations for the State concerned and rights for the addressees, which might change their positions in reliance on the unilateral act. As for third States, unilateral acts might, even if not giving rise directly to legal rights and duties, be of legal significance for them in other ways, for example as evidence of conduct or as a renunciation of rights. A basic principle governing the creation and performance of legal obligations was that of good faith. An international obligation that was assumed unilaterally was binding. Interested States could place confidence in a unilateral act and were entitled to require that the obligation thus created was respected by the State that had undertaken it. In order to protect the rights of addressees and preserve international legal stability, therefore, it should not be permissible for States to revoke or modify unilateral acts without the consent of the other States concerned. The principle of *rebus sic stantibus*

could also be considered as grounds for the revocability and modification of unilateral acts. The Vienna Convention on the Law of Treaties might provide a framework, mutatis mutandis, for the formulation of such a concept. It was almost a decade since the Commission had embarked on the issue of unilateral acts of States. It should now focus on determining the final form of its deliberation.

11. With regard to the topic "Reservations to treaties", her delegation's response to the question posed in paragraph 29 of the report was that there was often a need to retain a reserving State as a party to a treaty, even if its reservation was incompatible with the object and purpose of that treaty. That applied particularly to human rights treaties. The legal effect of reservations and objections was still uncertain, as noted by the Human Rights Committee in its General Comment 24. The Commission should therefore differentiate carefully between the current state of the law and what the law should be.

12. **Mr. Duarte** (Brazil), commending the third report of the Special Rapporteur on shared natural resources (A/CN.4/551 and Add.1 and Corr.1) and the work of the Working Group on Transboundary Groundwaters, said that Argentina, Brazil, Paraguay and Uruguay had under their territories one of the largest aquifers in the world, the Guarani aquifer, most of which was under Brazilian territory. The four countries had established a high-level group within the Common Market of the South to set up a legal framework to govern their rights and duties with respect to the aquifer. They had been able to reach understandings on most of the issues involved.

13. A step-by-step approach should be taken to the question of shared natural resources. States had the primary responsibility for the management of groundwater resources. However, that responsibility was not incompatible with States' commitments at the international level. Regional agreements, for example, played a fundamental role in reconciling national interests and international concerns in relation to the management of transboundary resources. As well as regulating access to those resources, regional commitments reaffirmed fundamental principles such as the obligation not to cause harm and the strengthening of cooperation practices.

14. Water resources belonged to the States in which they were situated and were subject to the exclusive sovereignty of those States. In that context, there should be an explicit reference in the draft articles to the principle of sovereignty regarding the use of transboundary resources set out in General Assembly resolution 1803 (XVII).

15. **Mr. Guan** Jian (China) said that his delegation basically endorsed the general principles governing transboundary groundwaters as set out in the draft articles. However, the latter should contain an explicit reference to the sovereign rights of aquifer States in accordance with the principle of permanent sovereignty of States over their natural resources enunciated in General Assembly resolution 1803 (XVII), which was the basis of the arrangements entered into by the relevant countries on the development and conservation of transboundary aquifers. Since the draft articles were no longer restricted to transboundary confined groundwaters, there was a danger that the draft articles might overlap with the Convention on the Law of the Non-Navigational Uses of International Watercourses. Their scope of application should therefore be limited to confined aquifer systems, or systems with negligible communication with surface water, which did not fall under the aforementioned Convention. Alternatively, the draft articles could be given special status as enjoying priority over other international agreements.

16. With regard to the exact meaning of the term "equitable and reasonable" utilization, and the question whether a distinction should be made, in the legal rules on utilization, between recharging and non-recharging aquifers, the Special Rapporteur should continue to study the practice of relevant countries and make further proposals based on ample scientific evidence. With regard to the obligation not to cause harm, his delegation supported the use of the phrase "significant harm". What constituted "significant" harm needed to be determined in the light of specific conditions, but the term already appeared in the Commission's work on international liability for injurious consequences arising out of acts not prohibited by international law. The Special Rapporteur was correct in not addressing the question of compensation in the draft articles.

17. His delegation supported the Special Rapporteur's view that the fact that the draft articles were currently in the form of a framework convention did not prejudge their final form, which could be settled after progress had been made on substantive questions. The form that they took would depend on

the extent to which they were legally binding. Given the complexity of the issue and the lack of information on State practice, the Commission should proceed with caution in deciding on the final form of the draft articles, so as to avoid imposing unreasonable constraints on the sovereign right of States and to enable questions relating to transboundary aquifers to be solved by consultation.

18. With regard to the topic "Unilateral acts of States", he said that, although the feasibility of codifying such acts remained doubtful, a considerable number of unilateral acts were based on a State's intention to produce legal effects. The existence of such acts, attested to by international practice and judicial decisions, was having a major impact on international relations. To determine the conditions under which such acts could produce legal effects would help to maintain the stability and predictability of international relations. As for the form that its work should take, the Commission should, even if it could not produce draft articles, take stock of its studies and identify some basic principles.

19. With regard to the topic of "Reservations to treaties", the core of the question was the conditions under which the formulation of reservations by States was permitted or prohibited. To treat the prohibition of reservations as an exception to the permission of reservations could encourage more countries to ratify international treaties, expand the scope of application of such treaties and maintain their integrity and effectiveness. As for how to judge whether a reservation was contrary to the object and purpose of the treaty, there was a dearth of uniform and objective standards in State practice. The Special Rapporteur's suggested terms — the "essential provisions" and the "raison d'être" of the treaty — might provide a temporary solution but could hardly eliminate subjectivity in making judgements. As for the relationship between reservations, on the one hand, and customary, peremptory and non-derogable norms, on the other, the latter were extremely complex concepts and their relationship with reservations needed further exploration. It would not be logical to single out for special attention reservations to human rights treaties, treaties on dispute settlement or agreements on the implementation of treaty monitoring mechanisms, since there were no special standards specifically governing such treaties.

Statement by the President of the International Court of Justice

20. **The Chairman** welcomed the President of the International Court of Justice and recalled the emphasis placed on the Court's work in the 2005 World Summit Outcome.

21. **Mr. Shi** Jiuyong (President of the International Court of Justice) said that, in 2004, the International Court of Justice, the principal judicial organ of the United Nations, had issued a final judgment in ten cases, the judgments in all of the eight cases concerning the *Legality of Use of Force* having been rendered simultaneously. The Court had held oral hearings in three cases. Since finalization of the Court's annual report to the General Assembly a new case had been filed, a sure sign of the Court's vitality and States' continuing trust in it. The total number of cases on its docket therefore stood at 12, a perfectly reasonable figure for an international court.

22. The Court's annual report contained many figures which did not shed much light on the true nature of the Court's work. Speculation about its work had often been far removed from reality. Admittedly, the Court had been careful to maintain a veil of discretion, not through a fear of transparency but because, like every judicial institution, it had a duty to maintain its independence and the confidentiality of its deliberations. Since the parties appearing before the Court were sovereign States and the legal questions submitted to it often arose in the midst of complex political situations, it was all the more important to maintain that independence and confidentiality. At a time when the Court was popular and its role in peacefully settling international disputes was acclaimed, it was vital to ensure that the exact nature of its work was fully understood by all.

23. The first thing to bear in mind was that the Court was a very small institution in terms of size and budget. Although it was one of the five principal organs of the United Nations, its budget for the 2004-2005 biennium had represented barely 1 per cent of the Organization's total budget for that period. In comparison, the budget of the International Criminal Tribunal for the former Yugoslavia had been nearly ten times larger than that of the Court. The latter had made very modest budgetary requests for the 2006-2007 biennium and it was therefore important to bear in

mind the constraints on its resources when evaluating its work.

24. The Court was the only principal organ of the United Nations to have its own independent administration. The Registry, the permanent administrative organ of the Court, had a unique status within the United Nations, since it was placed under the authority of the Registrar and the Court, rather than under that of the Secretary-General. The size of the Registry was in proportion to its budget. Its 98 staff members were spread among the various departments and technical divisions of the Registry. As far as the legal activities of the Court were concerned, it should be noted that the Legal Department was staffed by only 12 lawyers, five of whom formed a pool of clerks for the judges. That meant that the judges of the Court, unlike those of other international courts and tribunals and even of higher national courts, did not have the support of any personal law clerks. In fact, the only permanent institutional backup the judges received was that of their secretaries.

25. Despite its limited size and resources, the Court had established procedures and methods enabling it to accomplish its work efficiently and in a timely manner. Those methods were set out in the Resolution concerning the Internal Judicial Practice of the Court, which had been adopted pursuant to article 19 of the Rules of Court. Three stages could be defined in the progression of a case before the Court. First came the written stage, during which the parties to the case filed their pleadings with the Court. It was followed by the oral stage, during which the parties argued their case before the Court. The final stage was that of deliberation, during which the Court reached a decision on the case and wrote its judgment.

26. Focusing on the deliberation stage, he said that the criticism levelled against the Court on account of the length of its proceedings was unjustified. An examination of the entire lifetime of a case, from the day it was filed until the day the Court rendered its final decision, revealed that the written stage of the procedure was by far the longest. In other words, most of the time spent on deciding a case depended not on the work of the Court, but on that of the parties to the case. Delays in proceedings were often the result of procedural steps taken by the parties. When States resorted to litigation against each other, they did not wish to be constrained by procedures restricting their ability to present their case as fully as they wished. As a matter of principle, sovereign States which brought disputes before the Court could not be prevented from using all the procedural options at their disposal. Hence it was difficult for the Court to refuse to extend the time limits for filing certain pleadings or documents if all the parties to the case were in agreement.

27. Once the written pleadings had been filed, it was not uncommon for parties to jointly request the Court to "sit on" the case while they engaged in negotiations in an attempt to settle the case out of court. While the Court's function was to decide disputes through the application of international law, its principal objective was the peaceful settlement of disputes. It therefore welcomed any endeavours by States to arrive at such a settlement, even if it were reached out of court. If negotiations failed, the Court naturally regained its role of ultimate legal arbitrator. The simple fact that a case was on the Court's docket could act as an incentive to negotiate a settlement to a dispute in accordance with international law. That had happened in the two cases concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya v. the United Kingdom*) and (*Libyan Arab Jamahiriya v. United States of America*), whereupon the Court had issued two orders of 10 September 2003 placing on record the discontinuance with prejudice, by agreement of the parties, of the proceedings and directing that the cases be removed from the Court's list.

28. That did not signify that the Court was complacent about the efficiency of its operations and control over its proceedings. It had promulgated several Practice Directions aimed at accelerating contentious proceedings. It had requested parties to reduce the number and length of their written pleadings and annexed documents. It had fixed standard time limits for the submission of documents in incidental proceedings and had laid down strict rules regarding the filing of new documents after the written proceedings had closed. Those measures had already started to have an effect, but the fact remained that the parties had an important role to play in ensuring timely settlement of their case. When parties sought a swift settlement and cooperated fully with the Court, experience showed that the Court could act quickly. In two cases, *Avena and other Mexican Nationals* (*Mexico v. United States of America*) and *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v.*

Belgium), the final judgments had been delivered within 14 months and 16 months respectively of the application being lodged. In the latter case, the Belgian Government had agreed to present its preliminary objections and its arguments on the merits jointly, thereby allowing the Court to hear the whole case at once without a separate phase devoted to questions of jurisdiction and admissibility.

29. With regard to the deliberations, that part of the proceedings was entirely the responsibility of the Members of the Court. A case was under deliberation from the moment that the oral proceedings ended. If time allowed, the first deliberations of the Court were held directly after the President had declared the sitting of the Court closed. That meeting was relatively formal and its purpose was essentially to allow the President to distribute to the Members of the Court a list of questions which he had established during the earlier proceedings and which outlined the issues which the Court would, in his view, need to discuss and decide. The list was not definitive and was only intended to guide Members of the Court in their personal reflections about the case. Judges were thus free to discuss the list and to suggest amendments or additions to it during the meeting. However, Members of the Court tended to avoid discussing the subject matter of the questions at that stage, preferring first to organize their thoughts.

30. After that initial meeting, the Members of the Court retired to their offices for a period of up to several weeks, during which they wrote their notes, which were a complete exposé of their preliminary views on the case and on the way it should be decided. Notes were written in all cases except in incidental proceedings, in which the Court could dispense with written notes in order to accelerate the deliberation process. One of his predecessors, Judge Bedjaoui, had commented that the functions of a judge at the Court could be summed up in four verbs: to read, to listen, to deliberate and to decide. He himself felt that a fifth verb should be added: to write. The writing of the note was an essential part of the deliberation process, since it allowed each judge to analyse, filter and reorganize the vast amounts of information that he or she had read during the previous two phases of the proceedings. That period also allowed Members of the Court to research certain points of law which they felt to be fundamental. Although judges wrote their notes on their own, they received help from the Legal Department for specified legal research they might require. Once a case became ready for hearing, it was assigned to a team of lawyers from the Legal Department. That team first assisted the plenary and then the drafting committee in preparing research papers, editing texts, and producing, under the supervision of the President, documents intended to facilitate the work of the judges. The fact that judges wrote their notes on their own did not prevent them from having informal discussions with each other about specific issues. In the end, each note was unique in content and style as much as in length.

31. At the end of the period allowed for the writing of notes, the texts were collected by the Registry and sent to the Linguistic Department for translation into the Court's other official language. Article 39 of the Statute of the Court, stipulated that the official languages of the Court were to be French and English. The Court's work was done, at every stage, in both languages and the Court could only move to a new stage of its work once everything produced during the previous stage had been translated. During the drafting of a decision, both the French and English versions were treated as original versions and drafted very carefully. The comparison of the two versions during the drafting stage also lead to a more accurate phrasing of the Court's thinking. The bilingual nature of the Court therefore offered a guarantee of quality which was probably unattained in any other institution. The work of the Registry was in that sense vital, and produced some of the finest translations done in the United Nations. Once the notes had been completed and translated, they were distributed simultaneously by the Registrar to the Members of the Court, who then acquainted themselves with the thinking of their colleagues. Depending on the case, Members of the Court were given one or two weeks for that exercise, before the full deliberations began.

32. The deliberations proper of the Court were a unique experience for the participants. There were 15 judges, or sometimes 17 if the ad hoc judges were included, from every region of the world and representing the main forms of civilization and the principal legal systems of the world, all of whom were distinguished international lawyers, but with very diverse professional experience. For a period lasting from one or two days in the more straightforward cases to several weeks in the most complicated, the Members of the Court presented their views on the case under

deliberation in inverse order of precedence. The presentation sometimes reflected a judge's note, but that judge's views might have changed in the light of notes by other judges. Each exposé was followed by questions, comments, and requests for clarification from other Members. Slowly, presentation after presentation, a majority view began to appear and the future judgment began to take shape. At the end of the presentations, after presenting his own view, the President of the Court summarized the debates, recapitulated the points on which there seemed to be majority agreement and those which required further discussion. The Court then broke, and informal discussions were held outside the deliberation room.

33. The Resolution concerning the Internal Judicial Practice of the Court specified in article 6 (1) that on the basis of the views expressed in the deliberations and the written notes, the Court would proceed to choose a drafting committee by secret ballot and by and absolute majority of votes. Drafting committees were elected, insofar as possible, by consensus. In most cases, the President tried to determine which Members of the Court belonging to the majority would be interested in participating in the drafting committee and whether such a choice would satisfy other Members. During the break following the President's summary of the deliberations, the judges discussed the candidates and, when they returned to the deliberation room to vote, the President generally proposed two names. A secret ballot was then held and judges were free to follow the President's suggestion or to propose other names. Once the two members of the drafting committee had been elected, the President automatically became the third member of the committee unless he belonged to the minority. In such a case, the third post would be occupied by the Vice-President unless he too was in the minority. An election for a third member would then take place. In rare cases, when it was presumed that a decision would be very long, a fourth or even a fifth member could be added by election so as to allow for a better division of the drafting work.

34. The task of the drafting committee, assisted by the Registry, was to turn days of deliberation into a coherent and complete text reflecting the views of the majority. The decision to be written was usually divided among the members of the committee, each of whom was responsible for drafting his or her part. When all the parts were drafted, they were circulated and discussed by the members of the committee and modified accordingly. The parts were then merged and textual coherence was ensured by means of any necessary stylistic amendments. Next, the drafting committee made sure that a complete and accurate version of the text existed in both French and English; it always produced and revised the drafts in both languages and never circulated a draft before it was entirely satisfied with both language versions. In that sense, both versions were considered to be original drafting versions. The first draft completed by the drafting committee was called the "preliminary draft judgment", and was circulated to all Members of the Court, who were given a limited time to read it and propose amendments, which could be either substantive or stylistic. Each amendment was considered by the drafting committee and either accepted or rejected. To gain time, purely stylistic amendments were sometimes dealt with directly by the Legal Department. The amended draft was called the "draft judgment for first reading".

35. The drafting of a judgment was a complicated and very meticulous exercise. In the best case scenario, when all judges agreed on the outcome of the case, it entailed turning the views of 15 or more judges into one coherent decision. In the worst case, it meant expressing the views of the majority while simultaneously trying to accommodate the views of the minority on less contentious points. In order fully to understand the difficulty of the drafting committee's task, it was important to note that even when Members of the Court agreed on an outcome, they frequently disagreed on the manner of reaching it. It was, however, the very complexity of the task of drafting judgments that ensured their quality. If the Court was really to represent the international community and the various legal traditions it encompassed, it was essential that the voice of each of its 15 Members be heard and be taken equally into account. For that reason, every draft of the future judgment was submitted to the plenary of the Court for discussion.

36. The discussion of the draft judgment for first reading was the most thorough one. Each paragraph was read out before the full Court in both languages, and was then discussed so that every paragraph was reviewed. Although there was some discussion of stylistic changes, the debate generally focused on the substance of the decision, for instance on the approach taken by the drafting committee to reach the result to

which the Court had previously agreed. The first reading was almost like a second deliberation, during which major changes might be proposed and the legal and drafting skills of all Members of the Court were put to the test.

37. At the end of the first reading, the drafting committee met again, and, taking into consideration all the remarks of their colleagues and the decisions taken by the plenary, produced a new draft called the "draft judgment for second reading", which was circulated to all Members of the Court who then met in plenary session to discuss it. On that occasion, however, the text was not systematically read paragraph by paragraph. Except when a paragraph was either new or substantially amended, the President went through each page, asking whether the Members had comments about it; if there were none, the Court moved on to the next page, and so on. Since the draft for a second reading was the product of longer prior discussions, most comments at that stage concerned questions of style. For instance, the judges paid particular attention to the exact correspondence between the French and English version of the draft. A slight change in style in one language might require a change in the other text. Sometimes an apparently stylistic proposal might change the meaning of a whole sentence, or even a paragraph, leading to a debate on a certain point of a legal issue. The second reading would normally take a number of days, and again required careful and attentive work. When the Court had finished reviewing the reasoning of the decision, the President asked the Registry to read out the *dispositif*. The critical moment of voting had then arrived. One by one, the Members of the Court, in inverse order of seniority, were called on to vote by the President. The vote was registered orally and could only be expressed in a yes or no, with no abstention permitted. If the *dispositif* consisted of several paragraphs, each was voted on separately.

38. Once the votes had been tallied, the decision was almost ready. The Court then determined whether the French or the English version would be the authentic one. The decision still needed to be finalized by amending the text to reflect the remarks made and the decisions taken during the second reading. That was done by the Registry, after consultation with the drafting committee, if necessary. A date was then fixed for the public reading of the decision, and at that point, the drafting committee had effectively completed its task.

39. The drafting of a judgment unfolded over a period of from three months in some cases to eight or nine in others. His description of Court's work had, however, been slightly simplified. In very complex cases, there were sometimes one or two additional rounds of readings by the plenary. He had also omitted the procedure for the drafting of individual and separate opinions by Members of the Court. He hoped he had given an idea of the way in which the Court's decisions came into being, and wished to emphasize the care with which they were drafted. The whole process was aimed at ensuring that in each case the decision reached by the Court was the best possible one and was drafted in the best possible way. As the Court prepared to celebrate its sixtieth birthday, at a time when its popularity with the international community was historically unmatched, he hoped there was agreement that those procedures and working methods had proved efficient.

40. That was not to say that the Court and its work could not be improved. It had undertaken a thorough review of its working methods in recent years and, as a result, had introduced measures to enhance its internal functioning and to encourage greater compliance by parties with previous measures aimed at accelerating the procedure in contentious proceedings. The Court had also recently modernized and reorganized its Registry. The Court was continually reflecting on how to improve its work, and was open to suggestions in that domain. Not all, however, depended on the Court itself. If the Court's role as the principal judicial organ of the United Nations was to be strengthened in future, the international community also had a significant part to play. The Secretary-General, in his report entitled "In Larger Freedom: Towards Development, Security and Human Rights for All" had suggested that in order to reinforce the Court and make it more efficient, States that had not yet done so should consider filing a declaration recognizing its compulsory jurisdiction, and recognizing also that the duly authorized United Nations organs and specialized agencies should have greater recourse to the Court's advisory procedure. The Court supported those recommendations wholeheartedly.

41. In the 2005 World Summit Outcome, the Heads of State and Government had recognized "the important role of the International Court of Justice ... in adjudicating disputes among States and the value of its work" (A/60/1, para. 134 (f)). He assured the

Committee that the Court would continue to perform that role to the best of its ability and that it was ready and willing to fulfil other duties that might be entrusted to it.

42. **Mr. Gómez Robledo** (Mexico) said that he had seen at first hand the efforts made by the Court, despite its heavy workload, to resolve cases within the time frame requested by the parties and to respond to questions from them. With regard to the issue of the Court's official languages, his delegation had on many occasions expressed regret at the fact that Spanish was not one of them. However, after hearing the statement by the President of the Court, he understood that the volume of documentation produced by the Court and the standards of quality required meant that a substantial increase in financial and human resources would be needed for the addition of another official language. Nonetheless, his delegation continued to hope that Spanish would be added as an official language of the Court. Failing that, it would be useful for information about the Court in Spanish to be disseminated in Spanish-speaking countries, where many law students did not have the high level of competence in French or English required to understand the Court's rulings fully.

43. He asked what the implications of the choice of authentic language of the judgment were, in particular whether only the authentic-language version could be invoked in a later procedure. He would also like to know the origin of the rule that judges could not abstain from voting.

44. **The Chairman** said that, as a representative of a Spanish-speaking country, he endorsed the comments of the representative of Mexico about multilingualism in the Court.

45. **Mr. Matsimouka** (Congo) asked whether the Court, before handing down a judgment, considered only documents provided by States or whether it conducted appropriate investigations of its own. He also enquired whether mechanisms were in place to monitor the implementation of judgments in the relevant States and, if not, how the Court ensured implementation. In the case concerning the *Land and maritime boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, some unrest had occurred in each State after the judgment had been handed down. He would like to know how the Court had responded to those difficulties.

46. **Mr. Samy** (Egypt) said that the 2005 World Summit Outcome had not given as much prominence to the role of the International Court of Justice in the process of United Nations reform as his delegation would have liked. He asked how the Court, as one of the principal organs of the United Nations, envisaged its role in the strengthening of the Organization.

47. **Mr. Shi** Jiuyong (President of the International Court of Justice), responding to the comments made by the representative of Mexico, agreed that it was regrettable that the Court had only two official languages. That situation had been inherited from the time of the Permanent Court of International Justice, whose only official languages had been French and English, French being the most frequently used in deliberations. Since the Second World War and the establishment of the International Court of Justice, English had become more widely used, but all statements made in either language during proceedings were interpreted simultaneously into the other. Any increase in the number of official languages would require an amendment to the Statute of the Court and an increase in budget, which, at a time of financial difficulties in the Organization, was almost impossible to envisage. Even dissemination of information about the Court's work in other languages would be problematic because the Court had very limited translation facilities.

48. However, a brochure containing information about the Court, prepared by the United Nations Secretariat in New York, had been published in the six official languages of the Organization. In addition, the Secretariat issued a paper every few years containing summaries of the Court's decisions, also in the six official languages. Universities in Mexico might already have those publications in their libraries.

49. The Court's decisions were drafted in both official languages, yet one version was always chosen as the authentic version. That had been a tradition of the Court since its establishment in 1946. If a dispute arose with respect to the interpretation of a judgment, the authentic-language version was considered authoritative. The choice of authentic language depended on the case. If both parties were English-speaking, the authentic language chosen would be English; sometimes a system of alternation between

French and English was employed. His personal preference would be to regard both language versions as authentic. However, such a policy would be unlikely to win the approval of a majority of the Court.

50. Turning to the issues raised by the representative of the Congo, he said that the only documents considered authoritative for the purposes of the Court's deliberations and judgments were the written documents provided by both parties to a case. Other publicly available material could be used for reference only.

51. Since the Court's establishment, implementation of its judgments had generally been satisfactory because its jurisdiction was based on the consent of the parties. The case involving Cameroon and Nigeria was a sensitive one. When the judgment had been pronounced some years previously, the Secretary-General had met with the Presidents of the two countries and had agreed that a joint commission for the implementation of the judgment should be established. In the northern sector of the boundary, implementation was now almost complete. In other disputed areas of the land boundary, the parties had withdrawn their troops and agreed to implement the judgment. However, the process would be time-consuming and costly as the boundary terrain was rough. The main remaining problem area was the Bakassi Peninsula. The parties had agreed on implementation in that area but there were still issues to resolve, such as the procedure for Nigeria's withdrawal of its troops.

52. The Court had no actual implementation mechanisms. However, if one party to a case did not comply with the Court's judgment, the other party could, under Article 94 of the Charter of the United Nations, request the Security Council's assistance. For example, in the case concerning the *Territorial dispute (Libyan Arab Jamahiriya/Chad)*, the Court had awarded a certain area of land to Chad. However, following difficulties in implementing the judgment, the parties had requested the Security Council to provide an observer mission to oversee the withdrawal of Libyan troops. The situation in the area was now stable.

53. In reply to the question raised by the representative of Egypt, he said that the Court fully supported the Secretary-General's proposals for United Nations reform. It was broadly satisfied with its own procedures, although there might be room for improvement. There was a special committee responsible for reviewing the Rules of Court and their implementation. However, the Court had no specific proposals for its own reform.

The meeting rose at 12.20 p.m.

United Nations A/C.6/60/SR.16

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Chairman:	Mr. Yáñez-Barnuevo	(Spain)
later:	Mr. Hmoud (Vice-Chairman)	(Jordan)

Contents

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*)

Agenda item 158: Observer status for the Hague Conference on Private International Law in the General Assembly

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05-57646 (E)

The meeting was called to order at 3.05 p.m.

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*) (A/60/10)

1. **Mr. Prandler** (Hungary), referring to the topic "Shared natural resources", said that his delegation agreed with the Special Rapporteur's approach, according to which the draft articles should follow the pattern of the 1997 Convention on the Law of Non-navigational Uses of International Watercourses and should also cover activities which might have a negative impact on the aquifer system, such as above-ground pollution. As the Special Rapporteur had rightly pointed out, work on the international legal aspects should keep pace with overall development in that field, taking also into account the preparations for the Fourth World Water Forum, to be held in Mexico in 2006. Hungary had concluded agreements on transboundary underground water resources with some of its neighbours. The United Nations Economic Commission for Europe had played an important role in that field, and its experience should be taken into account in future consideration of the topic.

2. It was unfortunate that the 1997 Convention on the Law of Non-navigational Uses of International Watercourses, to which Hungary was a party, had not yet entered into force because of the high threshold established in that connection. That fact should be taken as a caveat concerning the final legal form of the draft articles.

3. With regard to the content of the draft articles, while his delegation agreed with most of article 7, on the obligation not to cause harm, it disagreed with the provision that the question of compensation should be discussed by the parties concerned. In view of recent developments in the field of international environmental law, consultation could not replace the requirement that adequate compensation should be provided in accordance with the "polluter pays" principle.

4. In draft article 14, on prevention, reduction and control of pollution, his delegation disagreed with the second sentence, the formulation of which was explained by the Special Rapporteur in paragraph 88 of the Commission's report. His delegation did not agree with the Special Rapporteur concerning the use of the expression "precautionary approach", since it believed that the precautionary principle had already been established as a rule of international customary law, as reflected in such instruments as the Rio Declaration on the Environment and Development and the International Law Association Helsinki and Berlin Rules on Water Uses and Management, as well as in various treaties. His delegation agreed with those members of the Commission who had stressed that the principle was well recognized as a general principle of international environmental law.

5. His delegation trusted that the Commission at its next session would be able to finalize the draft articles in second reading, taking into account the observations and proposals made during the current debate in the Sixth Committee.

6. **Mr. Panin** (Russian Federation) said that the topic "Shared natural resources" was to a large extent a continuation of the closely related topic of international watercourses, and his delegation commended the Special Rapporteur's approach to the draft articles. The report demonstrated that some transboundary aquifers and aquifer systems had their own specific features, making it necessary to adopt special regulations differing from those covering other international watercourses. The draft articles regulating the management of aquifers and aquifer systems therefore rightly emphasized bilateral and regional cooperation among the aquifer States and the establishment of joint mechanisms, commissions and monitoring. That had to be done taking due account of the sovereignty and territorial integrity of States.

7. Turning to draft article 3, he said that States must have sufficient flexibility and freedom of action in concluding bilateral and regional arrangements. As far as possible, account must be taken of the specific features of the aquifer or aquifer system concerned and the particular relations between the aquifer States, the level of their socio-economic development and related factors, priorities for the utilization of the aquifer for a specific period of time, and many other factors.

8. With further reference to draft article 3, his delegation had some doubts regarding the use of the term "arrangement", which might include both legally binding international legal agreements and legally non-binding political and administrative arrangements. In the first case, there was some duplication between draft articles 3 and 4. In the second case, the question arose as to the sense of including in the draft a provision

defining the correlation between an international legal instrument and non-international legal instruments. It would hardly be correct in that case to give priority to non-international treaties, as was done in draft article 3, paragraph 3. It might be sensible to adhere more closely to article 3 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

9. His delegation was in favour of retaining the criterion "significant" as applying to harm in article 7. The reference to "significant" harm should also be included in the title of the article. The concept of "significant harm" had already been used without any special problems in a number of international treaties aimed at protecting natural resources.

10. Turning to draft article 13, which contained the term "detrimental impacts", he noted that the term "impact" was used in draft article 1 (b), the term "adverse effects" was used in draft article 16, the term "significant adverse effect" was used in draft article 17 and the term "serious harm" was used in draft article 19. His delegation would welcome comments regarding the use of such a broad range of terms.

11. The future instrument should take the form of a draft framework convention containing the fundamental general principles on which aquifer States should base their conduct. The work on the draft was at a fairly advanced stage, thanks largely to the efforts of the Special Rapporteur, to whom his delegation was grateful. The Russian Federation hoped that the Commission would complete the first reading of the draft articles at its next session.

12. With regard to the topic "Unilateral acts of States" the discussion in the Commission had once again demonstrated the topic's complexity, and had called into question the feasibility of codifying international law in that area. His delegation doubted whether such codification was possible. Nevertheless, the Commission's work had been extremely useful, and he thanked the Special Rapporteur and the Chairman of the Working Group for their efforts, which had made it possible to reach some important conclusions. First, their work had confirmed that there were unilateral acts which produced legal obligations. Second, it had revealed the difficulty of determining any general rules that could be applied to unilateral acts, in particular regarding the persons authorized to formulate them, the time when they came into force and the possibility of modification or termination. As the study showed, a unilateral act could take both written and oral form and could also result from the conduct of a State. His delegation was inclined to believe that the Commission should not attempt to define such general rules.

13. It would obviously also be counterproductive for the Commission to concentrate on elaborating a single definition of unilateral acts, since they were too varied in their legal nature and in the ways in which they were performed. His delegation therefore believed that the Commission should focus on unilateral obligations, whose existence had been confirmed more than once, in particular by the International Court of Justice, and which played a most important role in inter-State relations. It would be useful to formulate a number of "indications" of the existence of a unilateral obligation of a State, which could be grouped according to traditional criteria, such as the persons or organs authorized to enter into unilateral obligations on behalf of a State and, the context and circumstances in which the corresponding actions had been taken, or according to the degree of their plausibility, i.e. whether they were primary or secondary. If, for example, a statement were made by a country's president at an international forum there were greater grounds for believing that that State had undertaken an obligation than if a statement were adopted on behalf of a parliament sitting in closed session. The first case should be regarded as a primary indication and the latter as a secondary indication.

14. Such indications would help States — both author States and addressees — to "synchronize their watches" as to whether a unilateral obligation existed. If all the indications of a unilateral obligation were present, that would not automatically mean that such an obligation existed; it would simply create a presumption that it existed. That in turn would shift the burden of proof that a unilateral obligation existed on to the author State.

15. The topic "Reservations to treaties" was complex and required very thorough consideration; formulating final conclusions and detailed comments would require more time. The term "validity", at least in its Russian connotation, was not the most felicitous one for defining the nature of reservations that could be made in accordance with international law. In Russian, the term was not really neutral, being in fact quite closely connected with the idea of legal consequences. A more appropriate term would be "admissible", as used in the draft guidelines. The concepts of the "validity" and

"invalidity" of reservations should preferably be used only when the legal consequences of reservations were being evaluated by the subjects entitled to do so, in particular a State or a court. That would be consistent with the provisions on validity of international treaties contained in the Vienna Convention on the Law of Treaties.

16. The closely related question of the presumption of validity of reservations, gave rise to a number of queries. The concept was apparently based on article 19 of the Vienna Convention. However, that article referred rather to the right of States and international organizations to formulate reservations and to the limitations to that right. The purpose of introducing into the draft guidelines the concept of presumption of validity of a reservation, even if the word "validity" were replaced by "admissibility", was not entirely understandable. His delegation would like the word "freedom" in the title of draft guideline 3.1 to be replaced by the word "right".

17. Another equally important aspect concerned the legal consequences of the invalidity of reservations. The main problem was whether invalid reservations could be separated from a State's consent to be bound by the international treaty to which the reservation had been made, in other words whether a treaty was valid for a State which had entered an invalid reservation to it. Reservations to human rights treaties were of particular interest in that connection. Some considered that reservations to such treaties could be separated from consent to be bound by the treaty so that the latter might become binding for the author of the reservation without applying the reservation. It had also been observed that such separability could likewise be acknowledged in relation to reservations to international treaties in all other areas. The concept had its weaknesses however: its opponents held that it undermined the foundations of international treaty law, which was based on the equal treatment of treaties on all subjects. The issue raised many questions and needed further serious study.

18. With regard to the definition of the object and purpose of a treaty, his delegation supported the Commission's cautious approach. It might be difficult to define a treaty's object and purposes in an accurate or objective manner, but such a definition might be a useful guideline for the purpose of interpreting a specific international treaty in conjunction with the reservations made thereto.

19. **Mr. Braguglia** (Italy) said that owing to its geographical location, Italy had only a limited interest in the question of transboundary aquifers. The Convention of 20 April 1972 on the protection of Italian and Swiss waters from pollution covered underground waters, but only to the extent that they might contribute to polluting certain waters listed in the agreement. Should further protection be needed, his Government would certainly take into account the Commission's draft articles.

20. His delegation was concerned about the slow progress being made with the draft articles on reservations to treaties. Given the difficulty of determining when a reservation was incompatible with the object and purpose of the treaty, the Commission should focus on the consequences of objections to such reservations. Under article 19 (c) of the Vienna Convention on the Law of Treaties, such a reservation should be considered invalid by the objecting State, and the reserving State should be precluded from entering into contractual relations with the objecting State. In practice, however, some States, even while considering a reservation to be incompatible with the object and purpose of the treaty, declared their willingness to have contractual relations with the reserving State. That practice would appear to be contradictory. It might be interpreted to indicate that despite the wording of the objection, it should not be taken to mean that the reservation was not valid under article 19 of the Vienna Convention. To avoid the whole problem, the Commission would do well to encourage States to make more appropriate use of the formulas set forth in article 19 of the Vienna Convention.

21. **Mr. Henczel** (Poland) said that the study of unilateral acts of States required consideration of both theoretical and legal questions and a careful case study. His delegation therefore agreed with the decision to devote the Special Rapporteur's earlier reports to the definition of, and general rules concerning, unilateral acts of States, and the seventh and eighth reports to the examination of unilateral statements and acts of States. His delegation appreciated the Working Group's offer to assist the Special Rapporteur in the elaboration of the principles on unilateral acts of States to be submitted together with illustrative examples of practice drawn from the notes prepared by the members of the Group.

22. The topic was very broad in scope and the attempts made to limit the coverage of the draft articles were therefore understandable. In that connection, Poland had considered with great interest the idea of differentiating between "unilateral conduct" and "unilateral acts *sensu stricto*", referred to in the Special Rapporteur's eighth report (A/CN.4/557) and in the discussion in the Commission. However, such a differentiation required a very careful determination and explanation. Otherwise it might be used to circumvent statements containing unilateral obligations by qualifying them as resulting from "unilateral conduct" and not unilateral acts. It was a very peculiar aspect of the study of unilateral acts (in the broad meaning of the term) that their differentiation from other acts occupied such a preponderant place. There were many forms of conduct of States that gave rise to legal effects, either directly or indirectly. Some were identified as unilateral acts of States, while the status of others required further examination, without which their legal effects (if any) could not be determined.

23. His delegation wished to emphasize that the idea of providing that States might create obligations for other States would be contrary to the sovereign equality of States. The Commission appeared to share that view. There were several acts by which States determined the scope of their territorial sovereignty or territorial jurisdiction. Some acts, either in the form of internal legislation or of an international act or international communication, were confirmed by the subsequent practice of States and might give rise to customary norms. Others were strongly opposed by other States. It would be too artificial to say that acts that were accepted by subsequent practice had been legal at the very moment of their inception. More caution was necessary in that respect.

24. It was doubtful whether the articles on unilateral acts of States were the best place to deal with acts and statements which formulated claims and determined the territorial scope of State jurisdiction. His delegation understood that the Special Rapporteur's intention had been to exclude from the scope of his reports acts giving rise to customary norms of international law, a position with which Poland agreed. The draft articles should concentrate on acts which created obligations for the author-State, meaning that they would not cover international protest or a number of other acts that might be identified in future work on the topic. A thorough study was needed to establish if all the rules on acts creating obligations for the author-State and on protests were exactly the same. In fact, the scope of the draft articles would be much narrower owing to the exclusion by the Special Rapporteur from his reports of acts connected with acquiescence and estoppel. Only some acts leading to obligation would actually be covered.

25. There could be no doubt about the binding effect some acts, such as recognition and renunciation, to which the principle *acta sunt servanda* clearly applied. It might be wondered whether their effects might not be too complex to be reflected in that principle alone. Nevertheless, bearing in mind the differences between various types of act and their legal effects, it was useful to draw attention to the common characteristic reflected in the principle *acta sunt servanda*, which was general enough to accommodate all acts giving rise to obligations on the part of the author-State. In that respect, the draft articles were of considerable value.

26. Referring to the matter of promise, he said that the principle *acta sunt servanda* seemed to be the most exact description of its legal effects. What was usually at stake and what might be an object of dispute was not the decision regarding the legal effects of a promise as such, but the determination as to whether a given statement was really a promise or a political statement (political act). The Commission would have to deal with that situation. States might and often did incur obligations by means of a unilateral promise, but, access to those promises was much more difficult than to international agreements. More stress should be put on the examination of cases relating to unilateral promises. An analysis of the views of author-States and beneficiary-States on the binding force of a given statement would be of great help. The case study undertaken in the seventh and eighth reports should be continued, with special emphasis on the question of unilateral promise. The seventh report referred to several statements of States and qualified them as binding. It would be useful if States could confirm or deny those qualifications.

27. Another subject that required examination was the influence of an objection by the beneficiary-State on the legal effects of a unilateral act giving rise to obligations of the author-State. The very idea that promise did not require approval or confirmation did not solve the problem of unequivocal rejection by the State which should normally welcome the promise.

State practice and doctrine in that area should be carefully examined.

28. Turning to the question of reservations to treaties, particularly draft guidelines 2.6.1 and 2.6.2, he said that a reservation, as such, had no proper legal effects. Only reservations established in accordance with article 20 of the Vienna Convention on the Law of Treaties exerted such effects. An objection to a reservation was an element (together with acts of acceptance of the reservation) of the process of giving the reservation its legal effects. That being so, the objection preceded the moment at which the reservation exerted its legal effects. In the light of the foregoing considerations, his delegation would like to propose that the draft guideline 2.6.1, on definition of objections to reservations, should be amended to read: "Objection" means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or organization purports to prevent the reservation from exerting its [potential] legal effects, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

29. Draft guideline 2.6.2 was acceptable if the idea of the late formulation or widening of the scope of the reservation itself was to be maintained.

30. Referring to the Special Rapporteur's tenth report (A/CN.4/558 and Add.1), he noted that the idea of the validity of reservations was applied in the context of the admissibility/permissibility of reservations. If that concept was generally acceptable to the Commission and to States, his delegation would not oppose it, although as pointed out by the Commission, it had certain disadvantages.

31. The draft guidelines proposed by the Special Rapporteur in his tenth report went in the right direction and were generally convincing. The draft guidelines could be supplemented by draft guidelines concerning the effect of the formulation of a reservation prohibited by the treaty and the effect of the formulation of a reservation incompatible with the object and purpose of the treaty. In general, such reservations should be considered null and void and would invalidate the consent of a State to be bound by the treaty. The question remained, however, whether in some instances the acceptance by all contracting States of the reservation prohibited by the treaty could validate the reservation in question. That question and many others should be answered by the Special Rapporteur and the Commission in the near future.

32. *Mr. Hmoud (Jordan), Vice-Chairman, took the Chair.*

33. **Ms. Galvão Teles** (Portugal) said that her Government was still analysing the draft articles on shared natural resources and determining whether there was any relevant national practice to report in its reply to the Special Rapporteur's questionnaire. It therefore reserved the option of making further comments on the draft articles at a later stage. Portugal had followed the Commission's discussions concerning the threshold of "significant" harm included in key provisions of draft articles 7 and 14, and the potential relation of those draft articles to general international law and specifically to the law of international responsibility and liability. Portugal was also interested in the discussion of draft article 3, particularly with regard to the words "to a significant extent" in paragraph 1 and the interconnection between the several agreements that might come into play. Another interesting issue was the final form of the work on the topic; without taking a position on the matter at the current stage, her delegation felt that there must be correspondence between the instrument's form and content.

34. The Special Rapporteur had noted that there were many similarities between groundwaters and oil and gas, and that the elaboration of draft articles on groundwaters would have implications for oil and gas, and that conversely State practice with regard to oil and gas had a bearing on groundwaters. Her Government was still considering whether, given the different characteristics of those natural resources, the principles being developed with regard to aquifers would apply in their entirety to oil and gas. It was necessary to keep an open mind in that regard.

35. Turning to the topic "Unilateral acts of States", her Government continued to believe that such acts had many varied effects, in order to meet the needs of States and of the international community. Portugal welcomed the Commission's declared intention to conclude its study soon, and encouraged it to present any results at the next session.

36. With regard to the topic "Reservations to treaties", she noted with satisfaction that the Commission had achieved significant progress on some of the most important issues. Concerning the draft guidelines proposed by the Special Rapporteur, her

delegation understood why he wished to qualify reservations as valid or invalid, but felt that such qualification was premature and that the issue should not be taken up until the legal effects of reservations had been discussed. The only distinction that seemed to constitute a good starting point was the one made in paragraph 355 of the Commission's report, namely the distinction between the position that reservations were intrinsically prohibited because they were incompatible with the object and purpose of the treaty and the position that the effect of reservations depended only on the reactions of other States. Such a distinction would avoid terminological and translation difficulties, and, being more neutral, would facilitate the analysis of State practice and the eventual intervention of independent judicial or quasi-judicial bodies, such as courts, tribunals or treaty-monitoring bodies. By following that path, the Special Rapporteur would be in a better position to qualify the effect of a reservation that was not acceptable in the context of a given treaty.

37. In any event, her delegation questioned whether there was any added value in having a qualification such as that of the "validity" and "invalidity" of reservations. Practice seemed to show that the Vienna Convention regime was sufficient in that regard, and that emphasis should be placed on the scope of a reservation's effects rather than on the qualification issue. The Vienna Convention was silent in that respect, whereas it provided clear provisions regarding the validity and invalidity of treaties.

38. There was also the specific and contractual nature of reservations and the central role which the Vienna Convention conferred upon States that were parties to the treaty to monitor the system in the absence, in most instances, of a third party independent body. The fact that a State did not object to a reservation did not necessarily mean that it considered that reservation to be valid. If no State objected to a reservation that did not necessarily mean that the reservation was valid, whereas the converse was also true. Silence on the part of States could not be transformed into an implicit system of validation of reservations.

39. Her delegation agreed with the general thrust of the proposed draft guidelines, but felt that guideline 3.1.5 would be improved by incorporating the idea expressed in paragraph 375 of the Commission's report, namely that in order better to define the object and purpose of the treaty in an objective rather than a subjective way, room had to be left for case law and doctrine. Draft guideline 3.1.6 could be merged with draft guideline 3.1.5, or might be considered superfluous, as the discussions in the Commission had seemed to indicate.

40. With regard to draft guideline 3.1.13, it would be preferable to keep the issues of reservations and dispute settlement separate or to treat the reservations in question like other reservations. On many occasions States agreed to become parties to a treaty if they could exclude the dispute settlement or implementation mechanism, and sometimes a State that had formulated a reservation to such a mechanism accepted it in practice on a case-by-case basis, without revoking the reservation. Her delegation feared that if the guideline were retained, many States would hesitate to participate in a treaty because they could not make a reservation excluding the dispute settlement or implementation mechanism, and that could jeopardize the quest for universality in multilateral conventions.

41. As for guideline 3.1.7, her delegation considered that the practice of formulating vague, general reservations should be discouraged, but felt that the automatic qualification of such reservations as incompatible with the object and purpose of the treaty seemed at first sight too severe.

42. While her delegation agreed with the proposals set out in guideline 3.1.8, it felt that it would be interesting to see if and how such a guideline would encompass future practice.

43. With regard to the Commission's request for comments, on the practice of objecting to reservations without opposing the entry into force of the treaty concerned, she said that Portugal normally objected under article 20, paragraph 4 (c), and not under article 20, paragraph 4 (a), of the Vienna Convention. The expected legal effects were those resulting from article 21, paragraph 3, of the Convention, namely that the provision subject to a reservation did not apply in the relations between the reserving State and the objecting State.

44. Presenting a "simple" objection to a reservation, invoking its incompatibility with the object and purpose of the treaty, might seem to be a contradiction in terms. It was the Vienna Convention that had opened up the possibility of such an outcome, which resulted from the combined regime of article 19 (c), article 20, paragraph 4 (c), and article 21, paragraph 3. On the face of it, that scenario seemed to be incoherent: only

article 19 provided the legal ground for it in its paragraph (c). The Special Rapporteur seemed to have opened a door that most States had overlooked: the one that allowed States to object to reservations for reasons other than the one provided in article 19 (c). That could be a path to explore in future, since the Vienna Convention was silent on the possible grounds for objections. Nevertheless, the practice could in some way and on some occasions be useful for States. First, "simple" objections to reservations grounded in incompatibility with the object and purpose of the treaty did not mean necessarily that the two States were automatically left with a non-treaty, since the object and purpose of a treaty might be a sum of different, equally important parts. Second, a State might consider that the reservation was incompatible with the object and purpose of the treaty but preferred to present a "simple" objection in order to maintain the reserving State within the treaty with respect to itself. Third, the use of "simple" objections grounded in article 19 (c) might also serve a political purpose, for example dramatizing the objection, especially if it were formulated simultaneously by a significant group of States, in order to lead the reserving State to modify or withdraw the reservation. A careful approach to the issue was required. It was essential to have sufficient flexibility to enable the same multilateral treaty to shelter within it several bilateral relationships between States parties. Otherwise, the different legal and political approaches of States would keep them from ratifying it.

45. Her delegation supported the Special Rapporteur's desire to organize a meeting at the next session with all the human rights treaty bodies and looked forward to hearing about its results.

46. **Mr. Troncoso** (Chile), referring to the topic "Unilateral acts of States", noted that the Special Rapporteur had succeeded in drawing from his study of a number of particular acts a series of elements that illustrated the great variety of their content, forms, authors and addressees. His delegation regarded unilateral acts of States as one of the sources of international obligations. In that connection, international practice was not only a factor of relevance for international customary law but also an element of analysis that was of undeniable importance and that, from the viewpoint of methodology, could contribute to the clarification of complex legal phenomena such as unilateral acts and conduct by States. His Government welcomed the work of compilation and systematization undertaken by the Special Rapporteur, and to a large degree shared the conclusions reached.

47. It disagreed, however, with the notion that the rules on the formulation of unilateral acts should be more flexible than those contained in the Vienna Convention on the Law of Treaties. In his eighth report (A/CN.4/557), the Special Rapporteur had put forward the view that, in addition to the persons authorized under that Convention to commit the State that they represented at the international level, there might be other persons who were in effect empowered to do so. His delegation thought that the criterion of flexibility was dangerous and could lead to abuses, since it was left to the addressee State to determine whether the person who had formulated a given declaration without being formally empowered to do so was actually authorized to bind the State that person claimed to represent. Under article 7, paragraph 1 (b), of the Vienna Convention, "flexibility" in the matter of representing the State was limited to the "practice of the States concerned", so that the decision was not left to one State alone.

48. On the other hand, his delegation agreed with the clear distinction drawn between unilateral acts in the strict sense of the term and conduct that might have similar effects. It seemed better to consolidate the progress achieved with respect to unilateral acts *stricto sensu* before embarking on a detailed study of conduct. The Commission could consider adopting a general definition of a unilateral act *stricto sensu* and then examining the draft articles already submitted to the Drafting Committee. The efforts of the Special Rapporteur and the Working Group on the topic should not be abandoned, and his delegation expected results from their active collaboration at the fifty-eighth session of the Commission. If a draft convention could not be agreed upon, the work done should at least enable the Commission to formulate guidelines.

49. **Ms. Matsuo de Claverol** (Paraguay) said that her delegation welcomed the substantial progress made by the Commission on the topic "Shared natural resources". Paraguay viewed the subject of transboundary aquifers with particular interest, since it shared the Guarani aquifer with Argentina, Brazil and Uruguay. Her delegation agreed with the view of some members of the Commission that the principle of permanent sovereignty over natural resources in

accordance with General Assembly resolution 1803 (XVII) should be given full treatment in a separate draft article, in order to avoid speculation and dispel doubts about interpretation.

50. Her delegation agreed with the Special Rapporteur that the principle of equitable utilization was viable only in the context of a shared resource, and that acceptance of the shared character of a transboundary aquifer among the aquifer States was not intended to internationalize or universalize transboundary aquifers. Paraguay particularly endorsed the view that a specific transboundary aquifer was the business of the aquifer States and that third States had no role in that regard.

51. Paraguay considered that a draft convention on the subject of aquifers should rest on three basic principles: sovereignty, use and environmental protection of the aquifer. Those were the pillars on which the Guarani aquifer States based their collaboration, with priority emphasis on protecting the aquifer from pollution, especially in the recharge process. Since the topic was a new one, not well-defined in international law apart from the principle of sovereignty over natural resources, it was not appropriate to elaborate provisions on the basis of analogy.

52. **Mr. Lavalle-Valdés** (Guatemala) said that his delegation was convinced of the usefulness of codifying or developing the law on unilateral acts of States and was therefore seriously concerned about the minimal progress made on the topic. The Commission had been considering it for eight years and had not adopted, even provisionally, a single article, owing not only to the extraordinary complex nature of the topic, but also to the lack of a suitable and consistent approach.

53. As a solution, his delegation continued to recommend a minimalist approach, in which, rather than formulating an abstract definition of a unilateral act, the Commission would focus on the four basic types of unilateral act: promise, protest, recognition and waiver. Moreover, it would limit consideration of those four acts from a formal standpoint as well, dealing only with explicit declarations and not with implicit or tacit manifestations, hence leaving aside unilateral acts that might produce legal effects independently of the intention of the States from which they emanated, including such State conduct as silence and acquiescence. The narrowed scope proposed had the additional justification that the four types of act mentioned were most amenable to codification, since they had the greatest similarity to treaties. It should be noted that of the four acts mentioned, only one raised problems with respect to the intention of its author to produce legal effects. A promise was often ambiguous on that point or was in fact made with the clear intention of not producing legal effects.

54. Although a definition covering specifically those four types of unilateral act might not be possible, a draft article applicable to all four and containing some of the elements of a general definition of a unilateral act could be drafted on the basis of paragraph 81 of the Special Rapporteur's fifth report (A/CN.4/525). In addition, many of the draft articles already formulated by the Special Rapporteur on the basis of the Vienna Convention could be used, and work could proceed on the basis of the structure and article headings outlined in paragraph 186 of the fifth report (A/CN.4/525/Add.2). The set of draft articles should include one inspired by article 3 of the Vienna Convention providing that the fact that the articles did not apply to other unilateral acts or conduct of States should not affect the legal force of such acts or conduct or the application to them of any of the rules set forth in the draft articles.

55. **Ms. Kaplan** (Israel) referring to the topic "Responsibility of international organizations", said that the Commission was seeking comments on the inclusion in the draft articles of a provision, similar to that found in article 16 of the Articles on Responsibility of States for Internationally Wrongful Acts, concerning aid and assistance provided by a State to an international organization in the commission of an internationally wrongful act. As a general principle, her delegation considered that the rule had potential relevance. At the time article 16 on State responsibility had been considered, Israel had questioned whether it was appropriate to limit a State's responsibility in situations of aid or assistance only to cases in which the act would be internationally wrongful if committed by that State. Similarly, it questioned whether the same limiting condition should be included in draft articles 12 and 13 concerning, respectively, an international organization aiding or assisting, or directing and controlling, a State or another international organization in the commission of an internationally wrongful act.

56. That observation appeared to be of equal relevance in the case of State assistance to an international organization. Nevertheless, it might be necessary to ensure that such a principle did not provide States with a pretext to avoid implementing properly adopted and lawful decisions of an international organization.

57. That said, the question of State assistance to an international organization, or State direction, control or coercion of an international organization, in the commission of an internationally wrongful act appeared to raise questions relating to State responsibility rather than to the responsibility of international organizations, which was the subject of the draft articles currently under consideration. Her delegation was therefore persuaded that it was not appropriate to include specific provisions on those issues in the draft articles. However, it might be appropriate to make some reference to them in the commentary.

58. On the topic "Expulsion of aliens", her delegation had concerns about the intended scope of the study and was not yet persuaded that the topic should be addressed by the Commission. If consideration of the topic were to proceed, it should be limited to the examination of the expulsion of individual aliens, whether present legally or illegally in the territory of a State, with due regard for the right to expel under international law and the possible limitations to that right. Any discussion of such issues as refugee status, refoulement, decolonization, self-determination and the movement of populations would clearly exceed the scope of the topic. Nor should it touch upon issues of State responsibility or diplomatic protection, which had been or were still being examined by the Commission. If the topic were thus narrowly defined, Israel would be able to share information regarding its procedures and legal mechanisms of examination and review in that field.

59. On the topic "Shared natural resources", any principles must be general and flexible in nature. Each transboundary aquifer or aquifer system was different, in both the scientific and social aspects, and there was no one solution for proper sharing of the resource. Accordingly, her delegation supported the general approach of the draft articles, which emphasized the importance of bilateral and regional arrangements and their precedence over the provisions of the draft articles.

60. The draft articles had usefully identified some important principles that had already gained recognition, namely, the principle of equitable and reasonable utilization; the obligation not to cause significant harm; and the obligation of aquifer States to cooperate to attain reasonable utilization and adequate protection of a transboundary aquifer or aquifer system. Many of the same essential principles were already reflected in instruments on the use of surface water resources, such as the International Law Association's Helsinki Rules of 1968, updated by the Berlin Rules of 2004, and the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. However, since the 1997 Convention dealt with a subject matter of lesser complexity with a longer history of State practice and still had limited ratification, consideration should be given to alternative final forms for the draft articles other than a convention.

61. **Ms. Dascalopoulou-Livada** (Greece) said that her delegation welcomed the complete set of articles proposed by the Special Rapporteur on the topic "Shared natural resources" and believed that, in order to fulfil their full potential, they should take the form of a convention. Regulation of the use of transboundary aquifers would satisfy a need that would become even more evident in the future and would also influence regulation of the use of other natural resources. Of course, many of the draft articles drew their inspiration from the 1997 Convention; there was a close connection between the two types of water sources, which favoured a holistic legal approach.

62. Draft article 3 encouraged aquifer States to enter into bilateral or regional arrangements. Her delegation felt that the term "arrangement" was vague and could refer to "soft-law" instruments. States should also be encouraged to adopt agreements; since the subject matter was new, there was a clear need for regulation, and agreements tended to be a better means to do so. Furthermore, it was hard to see how arrangements such as those envisaged in the draft could override a convention, if the draft articles ultimately took that form. Moreover, it was important that such arrangements or agreements should be compatible with such a convention.

63. In that regard, there was some overlap between draft article 3, paragraph 2, and draft article 4, paragraph 2. It was unclear whether the agreements referred to in article 4 regulated matters other than

groundwaters, and no distinction was made between present and future agreements. In addition, there appeared to be a contradiction between paragraphs 2 and 3 of article 3; if an eventual convention applied, in accordance with paragraph 3, only to the extent that its provisions were compatible with an arrangement, there would be no room for the harmonization called for in paragraph 2. It would be more logical to restrict the application of paragraph 3 to existing agreements and provide clearly for the harmonization of future ones.

64. Her delegation supported two innovative draft articles: draft article 18, which dealt with scientific and technical assistance to developing States, and draft article 10, which provided for harmonized standards and methodology for monitoring a transboundary aquifer. Another provision of cardinal importance was draft article 5 on equitable and reasonable utilization. However, with regard to its paragraph 2 (b), since the unilateral use of a non-recharging aquifer entailed the risk of diminishing the potential benefits for the other aquifer States, her delegation considered that the conclusion of an agreement between the aquifer States should be a prerequisite for any use of a non-recharging aquifer.

65. Draft article 7, paragraph 1, by referring to "significant harm", set too high a threshold, especially with regard to non-recharging aquifers, damage to which by definition could not be restored. Her delegation believed that the draft should depart from precedent and lower the threshold to "harm". With regard to draft article 7, paragraph 3, on compensation, the Special Rapporteur explained that the provision applied only to cases where the obligation of due diligence had been fulfilled and there was thus no question of State responsibility. Her delegation thought that the clarification should be made in the text of the provision.

66. **Mr. Peesteen** (Belgium), noting the Special Rapporteur's view that the incompatibility of a reservation with the object and purpose of a treaty raised a question about the validity of the reservation, said that his delegation welcomed the use of the term "validity". The Commission had asked about State practice in cases when a State objected to a reservation it considered incompatible with the object and purpose of the treaty, but without opposing the entry into force of the treaty between itself and the author of the reservation. Specifically, the Commission wished to know what effects the author expected such objections to have.

67. It was Belgium's view that the only possible effect of such an objection was the public denunciation of the alleged invalidity of the reservation. Since the validity of a reservation did not depend on whether an objection was raised, the objection had no effect other than to manifest a disagreement between the reserving State and the objecting State as to the validity of the reservation. An objection as to the validity of a reservation could not produce the same effects as an objection to a valid reservation, and in itself it did not demonstrate the invalidity of the reservation, which could only be assessed on the basis of the treaty itself.

68. Nonetheless, a series of similar objections to the same reservation might be considered an element of subsequent practice within the meaning of article 31, paragraph 3 (b), of the Vienna Convention, providing a basis for deciding the issue of validity. Most importantly, the accumulation of such objections might induce the reserving State to withdraw the reservation. Conversely, the absence or scarcity of objections as to the validity of a reservation might be an element to be taken into account in assessing its validity, although it was by no means the deciding factor.

69. Moreover, the issue of whether the State that had formulated an invalid reservation was bound to observe the provisions to which the reservation related, as well as the rest of the treaty, or whether it was released from the entire treaty obligation, depended on the sanction for invalid reservations and was not an effect of objections to invalid reservations. As it had pointed out the year before, his delegation wished to stress that when it objected to a reservation because it believed it to be contrary to the object and purpose of the treaty, while not opposing the entry into force of that treaty in its relations with the reserving State, its intent was to manifest that it considered itself bound by the treaty as a whole vis-à-vis the reserving State and would not take into account a reservation incompatible with the object and purpose of the treaty, considering that the solution provided in article 21, paragraph 3, of the Vienna Convention did not apply to the case.

70. **Mr. Kiboino** (Kenya) said that Kenya recognized the need for an international legal instrument on transboundary aquifers and aquifer systems and therefore welcomed the draft articles on shared natural resources. It hoped that the current focus on

transboundary groundwaters would be expanded to include other shared natural resources such as oil and gas. The Special Rapporteur was right to consult States and international organizations dealing with hydrogeological systems but might also consult bodies such as the United Nations Environment Programme.

71. His delegation noted with satisfaction the emphasis given to bilateral and regional arrangements in draft article 3 but thought that the existing wording might be interpreted as an "opt out" clause. It therefore proposed deleting "consider" from paragraph 2 so as to ensure that all regional arrangements were concluded within the framework of the convention, which should include guiding principles for more specific bilateral and regional arrangements. It also noted the paucity of State practice on the topic, especially in developing countries, and therefore appreciated the inclusion of draft article 18 on scientific and technical assistance to developing States.

72. Turning to the topic "Unilateral acts of States", he said that it was regrettable that little progress had been made over the past nine years. The slow progress was no doubt due to the complexity of the topic, and the Commission should redouble its efforts.

73. Some of the examples of State practice highlighted in the Special Rapporteur's eighth report (A/CN.4/557) might not fall within the definition of unilateral acts, especially in the light of the grid established by the Commission. The examination of State practice could greatly assist the quest to develop important concepts on unilateral acts. It was indeed vital to have a clear definition of unilateral acts of States capable of creating legal obligations and to distinguish such acts from acts creating political obligations. The definition should be sufficiently narrow not to infringe on the right of States to make political pronouncements and should reflect a deliberate intention to create a legally binding obligation. The person performing the act on behalf of the State must have the requisite capacity and authority. It would be preferable to restrict that category to the persons defined in article 7 of the 1969 Vienna Convention on the Law of Treaties. The Commission should continue to focus on draft articles for a legal instrument while keeping the guidelines or principles option open.

74. On the topic "Reservations to treaties", his delegation endorsed the approach of developing a guide to practice; such a guide and its commentary would reduce uncertainty and facilitate the operation of treaties. It noted with interest the discussion in the Commission on the complex questions of validity of reservations and compatibility of reservations with the object and purpose of the treaty. It saw merit in the use of "validity" instead of "admissibility" or "permissibility" in respect of reservations running counter to the object and purpose of the treaty. "Validity" was a broad enough term to cover both form and substance. However, the guidelines must remain within the context of articles 19 to 23 of the 1969 Vienna Convention. Since the definition of core terms would alleviate interpretation problems, his delegation welcomed the Special Rapporteur's efforts to define such nebulous concepts as "object and purpose".

75. **Ms. Gavrilescu** (Romania) said that because of the complexity of the topic "Reservations to treaties" it was difficult to draw any final conclusions on the concepts of the validity of reservations and the object and purpose of the treaty. The first concept was indeed necessary but required more precise definition, for an invalid reservation would be null and void. The notion of opposability was essential to the relationship between the State formulating the reservation and the other contracting parties. On the question of the admissibility of reservations, a distinction must be made between reservations compatible and reservations incompatible with the object and purpose of the treaty, for in the latter case the State formulating the reservation was not bound by the treaty.

76. The approach taken in draft guideline 3.1.11, which stated that a reservation designed to preserve the integrity of a State's domestic law might be formulated only if it was not compatible with the object and purpose of the treaty, gave rise to problems relating to the commitment of the formulating State and should be worded more clearly.

77. Her delegation agreed that article 19 of the 1986 Vienna Convention should be reproduced as it stood in draft guideline 3.1. It noted that the question of the effects which States attached to an objection to a reservation formulated by another State party to the same treaty was of particular interest in practice. When a State considered that such a reservation was not compatible with the object and purpose of the treaty the effect of the objection would be equivalent to the non-application of the treaty between the two parties: when the consent of the reserving State had been

expressed in terms regarded as unacceptable by the first State, the treaty itself could not have any legal effects between the two parties.

78. The analysis of the effects of the practice whereby a State objected to a reservation which it regarded as incompatible with the object and purpose without opposing the entry into force of the treaty between the objecting State and the reserving State should take into account several elements which formed a bridge between the legal and political aspects: the need to allow as many States as possible to become parties to international conventions; the wish of the parties that an objecting State might still want to maintain a link with the reserving State under the convention; the possibility of basing such an approach on legal and/or political arguments; the importance of leaving the door open to cooperation which might result in the reserving State reconsidering its position; the positive role of a collective opposition to a reservation with regard to achieving a legal effect (the withdrawal of the reservation) by political means (objection to the reservation and dialogue); and the undesirability of settling the problem without detailed study.

79. It must never be forgotten that the principles of free consent and good faith and the rule *pacta sunt servanda* were universally recognized, that the very purpose of the United Nations was to maintain international peace and security and that cooperation under treaties was the key to achieving that purpose.

80. **Ms. Rivero** (Uruguay) said that the assistance obtained from the scientific community had facilitated a much clearer understanding of the technical and geological aspects of the topic "Shared natural resources". Uruguay had a direct interest in the topic because it shared the Guarani aquifer, which extended beneath the territory of the four other members of the Southern Common Market (MERCOSUR). It was glad that the Guarani aquifer had in fact been studied by the Commission and could endorse many of the principles established in the Commission's work. Since 2003 the members of MERCOSUR had been working on an environmental protection and sustainable development project for the Guarani aquifer system in an effort to agree on fundamental principles for future regulations and activities.

81. It would be better if the topic was entitled "Transboundary natural resources", and her delegation noted in that connection the reference in draft article 3, on bilateral and regional arrangements, to "aquifer States". Uruguay endorsed the importance attached to the principles set out in draft article 5 (Equitable and reasonable utilization), draft article 7 (Obligation not to cause harm), draft article 8 (General obligation to cooperate) and draft article 9 (Regular exchange of data and information). A topic involving such an important resource as water and such a fundamental principle as the sovereignty of States could be dealt with only on the basis of good faith, cooperation and the application of international law. Uruguay further endorsed the treatment of the concept of "significant harm" in draft article 7 and the arguments underlying draft article 16 (Assessment of potential effects of activities) and draft article 17 (Planned activities). It was in favour of recourse to arbitration when the parties could not agree.

82. **Mr. Currie** (Canada) said that Canada agreed that the objectives of the proposed framework for a draft convention or protocol on transboundary aquifer systems (protection of aquifers, bilateral cooperation, and shared information) were important. The principle of not causing harm, *sic utere*, had in fact underpinned Canada's relationship with the United States with respect to transboundary environmental issues involving shared water resources. Existing bilateral instruments of Canada and the United States, such as the Boundary Waters Treaty, did not apply to groundwaters, but the Joint Commission established by that treaty had conducted studies on groundwater issues, and any further consideration of groundwaters would borrow from its principles.

83. In the current case, reliance on the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses as a framework for a new convention should be balanced by other approaches; since the 1997 Convention lacked international support and was not yet in force it would be preferable to explore other approaches which might generate consensus. In particular, the existing provisions, which would allocate water resources located in aquifers between States on the basis of "equitable and reasonable utilization", might run counter to other pre-existing formulas. However, it was useful that draft article 3 provided that bilateral and regional arrangements would prevail over the general provisions of the instrument. The approach of not creating a hierarchy of uses would run counter to Canada's

relationship with the United States, for the Boundary Waters Treaty had established a useful regime for uses.

Agenda item 158: Observer status for the Hague Conference on Private International Law in the General Assembly (A/60/232, A/C.6/60/1/Add.1 and A/C.6/60/L.9)

84. **Mr. Hamburger** (Netherlands), introducing draft resolution A/C.6/60/L.9 on behalf of the sponsors, said that Austria, Belarus, Belgium, Canada, the Czech Republic, Germany, Jordan, Morocco, the Republic of Korea, the Russian Federation, Slovenia, Turkey and the United Kingdom had joined the sponsors.

85. The Hague Conference currently had 65 member States from all continents, and 60 other States were parties to one or more of the Hague conventions. The Conference's statutory mission was to work for the progressive unification of the rules of private international law. Its work covered a wide range of areas such as commercial and banking law, international civil procedure, and family law. Thirty-six multilateral treaties had been adopted between 1951 and 2005. The Conference also provided legal services and technical assistance for member States and States parties to the Conventions.

86. The Conference cooperated with the United Nations system in all areas of its work: for example, it worked with the United Nations Commission on International Trade Law and the International Institute for the Unification of Private Law on a tripartite basis. It also worked with the United Nations Children's Fund, the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees, with the focus very much on the Hague Conventions on international child abduction, on adoption and on protection of children. It had also cooperated with the United Nations Conference on Trade and Development on such issues as the transfer of technology and the law applicable to licensing agreements and know-how. A fuller account of cooperation with the United Nations system would be found in the explanatory memorandum annexed to the letter requesting the inclusion of the item in the agenda (A/60/232).

87. There was scope for extending the Conference's cooperation with the United Nations system and therefore a need to formalize the relationship. The granting of observer status for the Hague Conference in the General Assembly would facilitate such cooperation, to the benefit of all Member States.

The meeting rose at 5.50 p.m.

United Nations A/C.6/60/SR.17

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Chairman: Mr. Yáñez-Barnuevo (Spain)

Contents

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*)

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05-57895 (E)

The meeting was called to order at 11.05 a.m.

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*) (A/60/10)

1. **Mr. Kerezoue** (Togo) said that the subjects covered in the International Law Commission's report (A/60/10) were of cardinal importance in a world undergoing far-reaching changes. The Commission had achieved noteworthy progress on the topic, "Expulsion of aliens". The Special Rapporteur should retain that title while carefully delimiting the topic's scope. Questions regarding admission or refusal of admission of aliens, population movements and situations resulting from decolonization or connected with self-determination should be excluded. A comparative study of national law and of all regional and international instruments on the subject would be useful. Greater heed should, however, be paid to reconciling the right to expel with the requirements of international law. In that connection, while a distinction certainly had to be drawn between the expulsion of aliens who were lawfully present in a country and of those who were not, it was essential to allow any alien facing expulsion a reasonable period of time to put his or her personal affairs in order before leaving the country and it was equally vital to respect the dignity of that person and all of his or her rights. It might be possible to contemplate the formulation of a universally accepted provision governing the procedure for the expulsion of aliens.

2. Since the Special Rapporteur on the effects of armed conflicts on treaties had managed to produce a complete set of draft articles within record time, the Commission ought to be encouraged to adopt a draft instrument on the subject in the near future. A new wave of non-international armed conflicts necessitated further reflection on the impact of such conflicts on bilateral and multilateral treaties, in order to decide whether they should be included in the definition of the term "armed conflicts".

3. The Special Rapporteur on reservations to treaties, in his latest report (A/CN.4/558 and Add.1), had highlighted a patent contradiction in State practice with regard to reservations which were incompatible with the object and purpose of a treaty. It was difficult to understand why some States would, on the one hand, find that certain reservations were incompatible with the object and purpose of a treaty yet, on the other, assert their readiness to enter into a treaty-based relationship with the reserving State.

4. **Ms. Ünel** (Turkey) said that the title of the topic "Shared natural resources" was likely to cause misunderstandings and should therefore be amended. She questioned the wisdom of using the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses as a model for the legal regime governing transboundary aquifers, because the Convention had not been adopted by consensus and had not entered into force. It did not, therefore, enjoy wide international support. Furthermore, since the paucity of State practice in respect of transboundary aquifers had been underlined in the Special Rapporteur's report (A/CN.4/551 and Corr.1 and Add.1), in pursuing its task of the progressive development of the law on aquifers, the Commission should be encouraged to explore divers approaches without forgetting customary law.

5. As the final form the draft articles would take would affect both their wording and their content, a choice should be made without delay. Her Government was in favour of a relatively flexible form, such as non-binding guidelines, which would be more effective in practice. States' permanent sovereignty over their natural resources should be the subject of a separate article, because it was a fundamental, well-established principle of international law. Her Government fully supported the Special Rapporteur's conclusions concerning a threshold of "significant harm".

6. **Ms. de Armas García** (Cuba) said that the proliferation of various kinds of unilateral acts of States and their different legal implications at the international level made their codification and progressive development essential. During that exercise, it would be vital to identify and define unilateral acts of States which were at odds with international law and the principles of the Charter of the United Nations and which, in fact, had adverse legal consequences for both the State performing such acts and other States. Such was the case of unilateral coercive measures which were extraterritorial in nature and which therefore had legal implications for a number of States. The use of unilateral economic, commercial and financial coercive measures of an extraterritorial nature in order to exert political and economic pressure on a State undermined the sovereign rights of other States. The blockade imposed on Cuba

by the United States of America, and more specifically the Helms-Burton Act, designed ultimately to engineer a change in Cuba's established institutional and political order, clearly constituted an example of such unilateral acts.

7. The Helms-Burton Act had all the characteristics of a unilateral act in international law in that it met the criteria of autonomy, publicity and production of legal effects. It was autonomous within both of the meanings given by the Special Rapporteur in his second report (A/CN.4/500 and Add.1), since its performance was not predicated on a pre-existing norm of international law and its formulation was exclusively an expression of the will of the United States Government. Its publicity had been ensured first by the publication formalities following its adoption and then by the ensuing wide international debate surrounding it.

8. As for its legal effects, the Act violated universally recognized norms and principles of international law. Since its aim was to control the form of government and the economic, political and social system of Cuba, the United States Government was violating the principles of Chapter I of the Charter of the United Nations. The Act in question was distinctly extraterritorial in character. Through it, the United States Government arrogated to itself the right to pass judgement on the conduct of other States and their nationals in their relations with Cuba. The extraterritorial nature of the Act had been recognized, inter alia, in the Opinion of the Inter-American Juridical Committee in fulfilment of resolution AG/doc.3375/96 of the General Assembly of the Organization of American States, entitled "Freedom of trade and investment in the hemisphere".

9. By failing to recognize the process of perfectly lawful nationalization which had taken place in Cuba in the 1960s, the United States Government was violating Cuban law and national sovereignty over its natural resources. The Act also infringed several other internationally accepted norms, such as freedom of investment and the principle that subsidiary companies were subject to the law of the land in which they were located. The international community had on numerous occasions rejected the imposition by States of economic, commercial and financial unilateral coercive measures as a means of exerting political and economic pressure on the grounds that they breached international law, the Charter of the United Nations and the principles of the World Trade Organization and also because they impeded the full exercise of the right to development and hindered international economic cooperation for development. The General Assembly had repeatedly condemned the use of such measures inasmuch as they constituted interference in the domestic affairs of States and therefore amounted to a violation of their sovereignty. Hence they were incompatible with the Charter of Economic Rights and Duties of States.

10. It was to be hoped that the proposals and conclusions submitted by the Special Rapporteur and the Working Group on Unilateral Acts of States in the coming year would begin to cover the codification of such acts and thereby contribute to the discussion of that subject in the General Assembly. The International Law Commission's aim should be to arrive at a comprehensive approach to unilateral acts which would promote cooperation resting on the legality and legitimacy of relations between States.

11. **Mr. Kanu** (Sierra Leone) said that the responsibility of States members of an international organization for its conduct as a result of their membership, or for their conduct associated with membership, was of exceptional importance because of the challenges faced by the international legal order. Detailed consideration of that topic at the International Law Commission's next session would therefore be welcome. The approach and methodology adopted by the Special Rapporteur in his third report on the responsibility of international organizations (A/CN.4/553) might require rethinking because, although States and international organizations were both subjects of international law, they were different in character. The nine draft articles provisionally adopted by the Commission at its fifty-seventh session contained no new element of progressive development of law. His Government subscribed to some of the views expressed in that connection by the representatives of Portugal and Slovakia. Moreover he urged the Commission to re-examine the view that member States shared joint and several responsibility and consider the possibility that responsibility could be apportioned.

12. The expulsion of aliens was a very important topic which affected the lives of many people around the world. The movement of people had major ramifications for international relations. The lack of uniformity in State practice with regard to the expulsion of aliens meant that it warranted serious

consideration and possibly codification. There was no disputing the fact that States had an inherent right to expel aliens from their territory, above all when their presence was inimical to the State's security interests, but that right must be reconciled with the requirements of international law, in particular those relating to the protection of human rights. The challenges faced by the international legal order since 11 September 2001 and ongoing collective expulsions of national minorities, asylum-seekers and refugees made clarification of the topic and its bold treatment by the Special Rapporteur all the more necessary.

13. His Government reserved its position on the validity of reservations to treaties and the concept of the object and purpose of a treaty pending the outcome of the draft guidelines which the Special Rapporteur had sent to the Drafting Committee. The dilemma with the regime on reservations to treaties was rooted in the lack of consensus on who should determine whether a reservation was incompatible with the object and purpose of a treaty and therefore invalid. Perhaps the Sixth Committee and the International Law Commission should recommend that all authors of treaties ought to consider the possibility of establishing a final authority who would rule on the validity of reservations.

14. With regard to the fragmentation of international law, his delegation welcomed the Study Group's further discussion of the function and scope of the *lex specialis* rule and the question of self-contained regimes; the interpretation of treaties in the light of any relevant rules of international law applicable in the relations between the parties; the application of successive treaties relating to the same subject matter; the modification of multilateral treaties between certain of the parties only; and the hierarchy in international law of *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations as conflict rules.

15. As far as the question of hierarchy in international law was concerned, "*erga omnes*" was really a concept about standing and could not therefore be regarded as a conflict rule in the same way as *jus cogens* norms, which related to the nature of rights and obligations. The decision of the International Court of Justice in the *Barcelona Traction* case suggested that the Court intended to limit *erga omnes* rights and obligations to those arising under *jus cogens* norms. Adding *erga omnes* obligations did not contribute anything new to the discussion. Treating both obligations *erga omnes* and *jus cogens* norms as conflict rules was incorrect.

16. It would be worth the Commission's while to formulate a set of rule-of-law principles, since the difficulties associated with the fragmentation of international law might significantly impinge on the rule of law. A set of rule-of-law principles would serve as a guide for further law-making activities and would ensure that the latter did not conflict with any of those principles.

17. His delegation welcomed the Commission's decision to consider the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), but believed that it should also include in its work programme the topics of the pre-emptive use of force in international law with particular reference to Article 51 of the Charter of the United Nations and that of the doctrine of responsibility to protect.

18. **Ms. Escobar Hernández** (Spain), referring to the topic of reservations to treaties, welcomed the Special Rapporteur's focus in his tenth report (A/CN.4/558 and Add.1 and 2) on the conditions for the formulation of valid reservations and the definition and scope of the object and purpose of a treaty. Her delegation supported the approach of basing the relevant provisions on article 19 of the Vienna Convention on the Law of Treaties and endorsed the use of the term "validity". Her delegation concurred with the general spirit of the draft guidelines and with the specific provisions for particular types of treaty or particular clauses contained in treaties. In that context, she expressed support for the current wording of draft guideline 3.1.12, which would ensure that essential human rights principles were protected. The provisions of draft guideline 3.1.13 also represented a good balance between preservation of the object and purpose of a treaty and the principle of free choice of means of dispute settlement, thereby preserving the practice, essential in her delegation's view, of including dispute settlement clauses in multilateral international treaties.

19. However, some of the draft guidelines required further thought. Draft guideline 3.1.1, which spelled out categories of prohibited reservations, was inconsistent with draft guidelines 3.1.3 and 3.1.4 in that it did not refer to implicit prohibition. Implicit prohibition should be mentioned, at least with regard to cases in which the treaty contained a clause authorizing

only specified reservations, which would have the effect of prohibiting all other reservations and precluding reference to the object and purpose of the treaty as a criterion for determining the validity of the reservation.

20. Draft guideline 3.1.11 should be redrafted to take into account not only the object and purpose of the treaty but also article 27 of the Vienna Convention on the Law of Treaties, to which it was closely related, particularly since States often used reservations relating to the application of domestic law as a way of avoiding the obligation to comply with the object and purpose of the treaty. In that context, it might be useful to link draft guideline 3.1.11 with draft guideline 3.1.7 on vague, general reservations.

21. Her delegation naturally agreed with the substance of draft guideline 3.1.9 on reservations to provisions setting forth a rule of *jus cogens*, but considered the provision superfluous. Moreover, it could be prejudicial to *jus cogens* itself to refer to the issue in draft guidelines whose sole object was to provide practical guidance on the application of a consensus-based system like the system of reservations to treaties.

22. With regard to draft guideline 2.6.1, her delegation had some concerns about the expression "whereby the former State or organization purports to exclude or to modify the legal effects of the reservation". It was not certain, in the light of the Vienna Convention on the Law of Treaties, whether the objective in question could always be achieved. Given that the effect of the objection was at issue rather than the concept of objection itself, it might be useful for the Commission to consider the question further in the future.

23. Draft guideline 2.6.2 on objections to the late formulation or widening of the scope of a reservation also required further analysis. Providing for the possibility of late reservations, even with the restrictions and cautions provided for, risked establishing a model whereby a treaty could be left permanently open.

24. With regard to the specific information requested by the Commission in paragraph 29 of its report, she said that Spain was not opposed, in general, to the entry into force of a treaty between itself and a third State that had formulated reservations to which Spain had objected on the grounds that they were contrary to the object and purpose of the treaty. Such a practice was permitted under the Vienna Convention on the Law of Treaties, with a view to ensuring the broadest possible participation in treaties. The question of the intended effects of such a practice was closely connected with the question of the effects of the objection itself. Her delegation took the view that the type of objection referred to, despite its particular significance, was subject to the same regime as other objections, irrespective of the reasons put forward for the objection. Therefore, the question was surrounded by the same ambiguity that had already been noted during the Commission's work.

25. However, her delegation strongly believed that the Commission's work should not remain in the realm of theory, but should be aimed at achieving practical impact. In that context, the formulation of objections to a reservation on the grounds that it was contrary to the object and purpose of the treaty, and the maintenance in force of a treaty between a reserving State and an objecting State, had a positive effect in that reservations detrimental to the core content of a treaty were identified and denounced, making it possible to open a "reservations dialogue" and, where appropriate, to induce the withdrawal of the reservation or to place acceptable limits on it. In addition, the interplay between the reservation and the objection could have consequences in the event of a dispute as to the provision or provisions affected by the reservation and the objection. There were practical examples of such cases and Spain therefore considered that it would be useful to retain the option of objecting to the reservation and maintaining the treaty in force between the States parties concerned.

26. **Mr. Hmoud** (Jordan), referring to the topic "Shared natural resources", said that there was currently no special legal regime governing transboundary aquifers and that the general rules on the issue did not provide sufficient guidance for States. His delegation therefore welcomed the Commission's efforts to develop a relevant set of draft articles. Although the Convention on the Law of the Non-navigational Uses of International Watercourses was a useful starting point in some respects, a somewhat different legal framework was required for groundwaters. Guiding principles for bilateral and regional cooperation in the use and management of transboundary groundwaters should be explored, without prejudice to the final form of the draft articles.

27. Groundwaters were a natural resource that was subject to the jurisdiction of the State that had sovereign rights associated with it. It was therefore important to include in the draft articles an explicit reference to General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources. It should be made clear that groundwaters were not a common heritage of humankind.

28. The utilization of transboundary aquifers was the core issue with regard to the scope of the draft articles. It would be sufficient in draft article 1, subparagraph (b), to provide that other activities as described by the draft articles fell within the scope of the draft articles, without introducing the concepts of "impact" and "likely impact", which would also raise questions about the relationship between such activities and the term "significant harm". Measures of protection, preservation and management should fall within the scope of the draft articles only insofar as they were related to other aquifer States' rights to utilization.

29. The list of definitions in draft article 2 was not exhaustive, and additional definitions might be required at a later stage. However, he welcomed the distinction drawn between recharging and non-recharging aquifers, both in draft article 2 and in draft article 5, a distinction which was justified, given the difference between the two types of aquifer in terms of sustainability. The distinction should also be carried over to the factors relevant to equitable and reasonable utilization set out in draft article 6, although some factors were applicable to both types of aquifers.

30. His delegation supported the approach of encouraging bilateral and regional arrangements among aquifer States, as set out in draft article 3, paragraph 1. Such arrangements could be binding or non-binding; there was no need to adopt more definitive language. His delegation also supported the inclusion of all relevant aquifer States in the negotiation and conclusion of management arrangements. However, the failure of one or more States to participate in good faith in such negotiations should not prevent the others from concluding the necessary arrangements among themselves. Draft article 3, paragraph 3, should make it clearer that an agreement among aquifer States prevailed over the provisions of the draft articles in cases of conflict between the two. The same applied to the provisions on protection and preservation, such as draft articles 12 and 14. The purpose of the draft articles was not to set universal environmental standards.

31. Draft article 5 rightly drew a distinction between reasonable and equitable utilization. Draft article 6 should therefore indicate which factors applied to equitable utilization and which applied to reasonable utilization. It should also be noted that an aquifer State's non-exercise of its right to utilize the aquifer should not prejudice the right of the other aquifer States to utilize it on the grounds that such utilization would be inequitable. Utilization should be considered equitable as long as the former State was not prevented from exercising its right by the other aquifer States.

32. Similarly, draft article 7 should make it clear that an aquifer State which exercised its right to utilize the aquifer without taking any other measures that had adverse effects should not be regarded as causing significant harm to the other aquifer States, even if the other aquifer States were not exercising their rights. In draft article 7, paragraph 2, the word "impact" was both unnecessary and confusing. It was sufficient to refer to "other activities", especially as the paragraph went on to provide for appropriate measures to prevent significant harm to other aquifer States. The issue of liability should be left to other rules and instruments of international law. The reference to compensation in draft article 7, paragraph 3, should therefore be deleted.

33. The general obligation for aquifer States to cooperate with each other should be reconsidered because it had legal consequences for States which would otherwise have unqualified sovereign rights to utilize the aquifer. It should also be noted that the aim of "adequate protection" of a non-recharging aquifer might be unrealistic, as utilization could eventually result in consumption of the whole of such an aquifer. A distinction should therefore be made in draft article 8, paragraph 1, between the protection of recharging aquifers and that of non-recharging aquifers.

34. **Mr. Momtaz** (Chairman of the International Law Commission), introducing chapters V, VII and XI of the Commission's report (A/60/10), said that chapter V dealt with the effects of armed conflicts on treaties, one of the two new topics taken up by the Commission in the current year. Though new to the Commission, the topic had been the subject of State practice and theoretical development since at least the turn of the previous century. Indeed, the Commission at its fifty-

seventh session had had before it a useful study prepared by the Secretariat containing a comprehensive review of past consideration of the topic and a discussion of the different issues involved (A/CN.4/550 and Corr.1).

35. The Commission had also had before it the first report of the Special Rapporteur on the topic (A/CN.4/552), which contained a set of 14 draft articles establishing a basic framework for the organization of the Commission's work on the topic and for the provision by Governments of comments and examples of relevant State practice. The basic policy underlying the draft articles was to promote and enhance the security and stability of the legal relationships between States by minimizing the number of occasions on which the outbreak of armed conflict might have an effect on treaty relations. The Special Rapporteur had also taken the approach of drafting articles compatible with the Vienna Convention on the Law of Treaties of 1969; in other words, he had viewed the subject matter as part of the law of treaties rather than as a development of the law relating to the use of force.

36. One of the difficulties in considering the topic was that it was dominated by doctrine, and practice was sparse, with much of it being old. The key policy change had been the gradual shift towards pragmatism and away from the view that the incidence of armed conflict was beyond the realm of law and more or less non-justiciable.

37. Draft article 1 dealt with the scope of the draft articles and was based on the equivalent provision of the Vienna Convention on the Law of Treaties. The Commission's discussions had centred on proposals either to extend the scope of the draft articles — for example, to include treaties entered into by international organizations — or to restrict the scope so as to exclude certain categories of treaty.

38. Draft article 2 set out definitions of the terms "treaty" and "armed conflict". The definition of "treaty" was based on that of the Vienna Convention, and had therefore caused little controversy. However, the definition of "armed conflict" was based on that adopted by the Institute of International Law in 1985 and had been the subject of more lengthy discussion. While the Commission had supported, in principle, the Special Rapporteur's suggestion that it should not attempt to achieve a comprehensive definition of armed conflict for the purposes of the draft articles, a number of questions had been raised in that regard, for example, whether the effects of non-international armed conflicts on treaties should be included in the scope of the topic. Other questions had concerned whether the definition of armed conflict should include blockades or military occupation not accompanied by protracted armed violence or armed operations.

39. Draft article 3 established the basic principle that the mere outbreak of armed conflict, whether or not the conflict was a declared war, did not ipso facto terminate or suspend treaties in force between parties to the conflict. The Commission had supported the basic thrust of the proposed draft article; most of its comments had been aimed at making the wording more precise. For example, it had been suggested that there might exist categories of treaty that were automatically terminated or suspended in the event of armed conflict between parties; that a distinction might usefully be made between termination and suspension; and that the position of third parties should be clarified.

40. Draft article 4 dealt with the indicia of susceptibility to termination or suspension of treaties in case of an armed conflict. Having reviewed the various approaches taken in the past regarding the effects of armed conflicts on treaties, the Special Rapporteur had suggested that the criterion most representative of existing international law was that of the intention of the parties at the time they had concluded the treaty in question. Paragraph 2 of the draft article established that the relevant intention of the parties to a treaty would be determined in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties and the nature and extent of the armed conflict in question. During the Commission's discussions, some members had expressed doubts about the criterion of intention, given the difficulty of determining the intention of States parties at the time of conclusion of a treaty as to the effect that armed conflict between those parties would have on the obligations under the treaty. It had also been suggested that, although intention might be an important factor, it was not necessarily the sole relevant criterion, and that other criteria, such as compatibility with the armed conflict, might also be applicable.

41. Draft article 5 dealt with the situation in which treaties expressly applicable to armed conflict remained operative in the event of an armed conflict and the outbreak of such a conflict did not affect the

competence of the parties to the conflict to conclude treaties. The provision had enjoyed general support in the Commission. However, it had also been suggested that the draft article should be further refined by, for example, including in it the principle enunciated in the 1996 Advisory Opinion of the International Court of Justice concerning the *Legality of the Threat or Use of Nuclear Weapons* that, while certain human rights and environmental principles did not cease to apply in time of armed conflict, their application was determined by "the applicable *lex specialis*, namely, the law applicable in armed conflict which [was] designed to regulate the conduct of hostilities".

42. Draft article 6 dealt with the more specialized question of treaties relating to the occasion for resort to armed conflict. The Special Rapporteur was of the view that, under contemporary international law, there was a presumption in favour of the continuation of existing obligations under such treaties, unless the contracting parties decided otherwise. While there had been some support for the Special Rapporteur's proposed text, the provision was problematic, particularly as it had become largely redundant in the light of draft article 3. Doubts had also been expressed as to the Special Rapporteur's view of the contemporary position under international law.

43. Draft article 7 dealt with treaties the object and purpose of which involved the necessary implication that they continued in operation during an armed conflict. Paragraph 1 reiterated the basic principle that the incidence of an armed conflict would not as such inhibit their operation. Paragraph 2 contained a non-exhaustive list of categories of such treaties. The Special Rapporteur had kept an open mind when preparing the list, which therefore included categories that he himself did not support. Differing views had been expressed as to the appropriateness of the criterion of object and purpose. It had been pointed out that the applicable considerations might be primarily contextual in nature. Doubts had also been expressed as to the viability of including an indicative list.

44. Draft articles 8 and 9 dealt with some of the mechanics of the topic. Draft article 8 concerned the way in which a treaty might be suspended or terminated in the case of an armed conflict between the parties. The provision, which simply referred the reader to articles 42 to 45 of the Vienna Convention, had proved largely uncontroversial. Draft article 9 dealt with the possibility of the resumption of a treaty following the conclusion of the armed conflict, provided that such resumption was in accordance with the intention of the parties at the time that the treaty had been concluded. General support had been expressed for the provision, subject to some refinements.

45. Draft article 10 dealt with the question of the legality of the conduct of the parties to an armed conflict. In line with his overall principle of avoiding issues relating to the legality of the use of force, the Special Rapporteur had proposed a text that simply made it clear that the legality of the conduct of the parties to the conflict had no bearing on the termination or suspension of a treaty. Some members of the Commission had favoured the inclusion of provisions similar to those contained in articles 7, 8 and 9 of the Institute of International Law resolution II of 1985, which would distinguish between States acting in individual or collective self-defence, or in compliance with a Security Council resolution adopted under Chapter VII of the Charter of the United Nations, and those of the aggressor State. Others had opposed the introduction of references to the inequality of belligerent parties in the draft articles.

46. Draft articles 11 to 14 contained a series of "without-prejudice" clauses dealing with the legal effects of decisions by the Security Council under Chapter VII of the Charter; the status of third States as neutrals, the overlap with other aspects of the law of treaties; and the question of the revival of terminated or suspended treaties. The draft articles had enjoyed general support.

47. There had been general agreement in the Commission that its work would benefit from information provided by Governments as to their practice and any other relevant information. He understood that, at the Special Rapporteur's request, the Secretariat had circulated a request to Governments for information in August 2005. He trusted that Governments would be able to reply before the end of February 2006, so that the Special Rapporteur could take any information into account when preparing his next report.

48. Chapter VII of the report dealt with the topic "Diplomatic protection". On completing the first reading of the draft articles at its fifty-sixth session, the Commission had requested the Special Rapporteur to consider the possible relationship between the "clean

hands" doctrine and diplomatic protection. The Special Rapporteur's memorandum on the subject had subsequently been issued as his sixth report (A/CN.4/546). The Special Rapporteur had taken the position that, notwithstanding the importance of the clean hands doctrine in international law, it was not sufficiently closely linked to the topic of diplomatic protection to warrant inclusion in the draft articles because: it had most often been raised in the context of inter-State claims for direct injury by a State to another; once a State took up its national's claim concerning a violation of international law, the claim became that of the State, so that the misconduct of the national ceased to be relevant; and there was little authority for the applicability of the doctrine in the context of diplomatic protection. Indeed, the Special Rapporteur had recalled that there had been almost no support within the Sixth Committee during the fifty-ninth session for including the doctrine. The Commission had generally supported the Special Rapporteur's view that it was more appropriate for the clean hands doctrine to be invoked during the examination of the merits, since it related to the attenuation or exoneration of responsibility rather than admissibility. Lastly, he recalled that the Secretary-General's letter of 19 October 2004 had requested written comments from Governments to be received by 1 January 2006. To date, very few such comments had been received, and he wished to reiterate the importance attached by the Commission to receiving comments and observations in writing. Appropriate guidance from Governments was crucial to the next report on the topic and to the achievement of the Commission's goal of completing the second reading at its fifty-eighth session.

49. With regard to the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", which appeared in Chapter XI of the report, the Commission had established a Study Group in 2002 and had agreed on five studies to be conducted. Substantive consideration of the various studies had begun in 2004, with the focus on the substantive aspects of fragmentation rather than the institutional aspects, such as conflict of jurisdiction between one body and another. More generally, the Study Group had elected to adopt an approach emphasizing international law as a legal system, with constituent rules operating in relation to other rules and principles. No regime was self-contained, in the sense that it could operate in a vacuum. The various rules existed at different hierarchical levels; their formulation might involve greater or lesser specificity; and their validity might be contingent upon dates earlier or later in time. To resolve conflicts between rules, articles 30, 31, 32, 41 and 53 of the Vienna Convention on the Law of Treaties were often applied, along with general principles of treaty interpretation such as harmonization, integration and *lex specialis*, *lex posterior* and *lex superior*.

50. The Study Group had considered three substantive issues at the fifty-seventh session. The first related to regionalism, following on the interest aroused by the study at the previous session of the function and scope of the *lex specialis* rule and the question of "self-contained regimes". A memorandum by the Chairman of the Study Group had noted that the expression "regionalism" did not feature prominently in the literature of international law. Where it did, it seldom took the form of a "rule" or "principle". The term was understood in at least three different ways: as a set of approaches and methods for examining international law; as a technique for international law-making; and as the pursuit of geographical exceptions to universal rules of international law. The first two meanings given to the term had been adequately covered in the study entitled "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'", only the third use of the term offered possibilities for fruitful further consideration.

51. Regional *lex specialis* seldom arose as an application or modification of a general rule or a deviation from such a rule. It might refer, in a positive sense, to a rule or principle with a regional sphere of validity in relation to a universal rule or principle or, in a negative sense, to a rule or principle that imposed a limitation on the validity of a universal rule or principle. The memorandum also addressed two additional features associated with regionalism: the question of universalism and regionalism in the context of human rights law and the relationship between universalism and regionalism in the context of the collective security system under the Charter of the United Nations.

52. The second substantive issue considered by the Study Group related to the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31, paragraph 3 (c), of the Vienna Convention on the

Law of Treaties), to which recourse had been made with increasing frequency over the recent years, as evidenced by the decisions of a number of judicial bodies. In their discussions, the Study Group had stressed the need to operationalize article 31, paragraph 1 (c). In the interpretation of a treaty, the "other relevant rules" to be taken into account included customary law and general principles, as well as other treaties. Custom and general principles took on particular importance when the wording of a treaty was imprecise or unclear or when there was a recognized meaning in customary law or general principles for the terminology used in the treaty. The Group endorsed the presumption that parties did not intend to act inconsistently with their other obligations and that they intended to refer to general principles of international law for all questions that the treaty itself did not resolve in a different way. While "other obligations" were generally assumed to be obligations in force at the time of the conclusion of the treaty, there were also situations where subsequent events could also be relevant.

53. Lastly, the Study Group had reviewed a report entitled "Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules". It was generally understood that there was no general hierarchy of sources in international law. The notions of *jus cogens*, obligations *erga omnes* and Article 103 of the Charter as conflict rules operated largely independently of each other. Only *jus cogens* and Article 103 related, strictly speaking, to normative hierarchy, while obligations *erga omnes* were concerned more with the scope of application of the relevant norms. The Study Group did not intend to catalogue such norms but rather to emphasize their use as conflict rules in dealing with fragmentation. The Study Group had noted that the issue of normative hierarchy was closely linked to other topics, in that it governed the permissibility of particular agreements as *leges specialis*, as subsequent agreements or as *inter se* modification of multilateral treaties.

54. It was envisaged that the Study Group would submit a consolidated study to the Commission at the fifty-eighth session. The study would be largely analytical, describing the phenomenon of fragmentation and offering legal analyses on the basis of the five studies, with particular reference to the Vienna Convention on the Law of Treaties and general international law. The remainder of the study would bring together a set of conclusions, guidelines or principles that emerged from the Group's studies and discussions which would serve as both the Group's conclusions and as practical guidelines for practitioners to assist them in issues relating to fragmentation in the international legal system.

The meeting rose at 12.45 p.m.